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CASE

OF

CATHARINE N. FORREST,
= **PLAINTIFF,**

AGAINST

EDWIN FORREST,
DEFENDANT,

Containing the RECORD in the SUPERIOR COURT
OF THE CITY OF NEW YORK, the Opinions in that
Court, the STATEMENT and POINTS for
each party in the COURT OF APPEALS
and the Judgment of the latter Court.

IN TWO VOLUMES.

Vol. 2.

NEW YORK,

1863.

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SUPREME COURT.

CATHARINE N. FORREST

agst.

EDWIN FORREST.

City and county of New York, ss.

2444

Margaret E. Voorhees, being sworn, says, as follows :
 I am the wife of Benjamin Franklin Voorhees, now trading between San Francisco and Canton, and on a voyage to the latter place ; I am twenty-eight years of age, and am a sister of Mrs. Forrest. She and I keep house together in Sixteenth street, in the city of New York. I first came to the United States in April, 1839, with my parents. On invitation by a letter from Mrs. Forrest, our family immediately took up our residence at Mr. Forrest's house, in Reade street, Mr. and Mrs. 2445
 Forrest being then absent at New Orleans, on a professional tour. We resided in his house, Mrs. Bedford having charge thereof, until August following, when my parents left for the South. Mr. Forrest came home first in July, 1839, and took me to Harrisburgh, in Pennsylvania, to see my sister, who was there confined with her second child. We soon returned, and I remained in Mr. Forrest's family thence until the month of January, 1847. We removed from Reade street to Twenty-second street, in November, 1839 ; and from that time until I left, in January, 1847, I was in charge of the house, under my sister when she was at home, and 2446
 exclusively, when she was absent. During these seven years, Mrs. Bedford did not reside with Mr. Forrest, and he had no housekeeper except my sister and myself ; and during this period, Mr. Forrest and my sister were at home about one-third of the time. At one period ending in September, 1846, they were absent on a visit

2447 to England for more than twenty consecutive months. During such absences I used to receive the money needed for the house expenses, and always rendered the account of my expenditures to Mr. Forrest on his return. Until the last occasion, he invariably handed me back the account without looking at it, and appeared quite satisfied. Mr. Forrest had had his controversy with Mr. Macready in England, during the said visit, and on his return exhibited excessive ill-temper. He took the account on that occasion, and it was unsatisfac-

2448 tory, as I learned, from hearing him storming and speaking violently about it to my sister ; and he went to Boston, where he had a professional engagement, in great anger, without speaking to me on the subject. The account was certainly imperfect, and I had used about three hundred dollars of his money for my own purposes, yet I was equally astonished and distressed at his violence, having conducted matters to the best of my ability, and not having taken any liberty to which an objection could have been reasonably anticipated ; Mr. Forrest being well aware that from the weak state of my health during the greater portion of his stay

2449 abroad I was unable to earn the amount of money usually acquired by me from giving lessons in music. In my perplexity I conferred with Mr. Lawson, Mr. Forrest's particular friend and business agent ; Mr. Lawson said he could find no fault with me, but on the contrary, observed that if he had a sister-in-law residing with him and rendering the same services, he would be happy to make her an allowance for her dress, and to preclude the necessity of her teaching music, which I had done for five years. It was some weeks before I

2450 succeeded in having a conversation with Mr. Forrest, the only one I ever had with him by myself ; he disagreed with me in many things, but still our interview closed pleasantly. Mr. Forrest has been paid all his claims on the accounts, except one hundred dol-

lars, which is yet due. I never understood that he wished me to leave his house, but the contrary, still I saw fit to leave at the time before stated, when I went to board with my friend, Mrs. Caroline M. Kirkland, and I have never since resided with Mr. Forrest. On further consultation with Mr. Lawson, after my interview with Mr. Forrest, he disapproved of 2451 the course I had taken in that interview, and said that I ought to have acknowledged myself in the wrong, *whether I was so or not*, and he added that the love of money was becoming a disease with Mr. Forrest. Mr. Lawson further advised that the cause of the difference between Mr. Forrest and myself should not be mentioned to any one, nor even the difference itself, if it could possibly be avoided; in which last idea both Mrs. Forrest and I fully concurred, knowing that if Mr. Forrest considered himself pledged to any course he would never retract; and we both resolved that nothing should be said or done which it would be unpleasant for him to remember, when, as we hoped, his better feelings should return. My child was born on the 4th of June, 2452 1847; my husband and myself visited Mr. Forrest by invitation, and dined with him and my sister and Mr. Parke Godwin, on the 18th of April, 1847. Mr. Forrest treated us with the utmost cordiality, and it was understood by all the company that the dinner was expressly given by him, and that we were all invited by him. I never heard of Mr. Forrest's being in any way averse to me until November, 1848, when my sister informed me that Mr. Forrest had expressed himself angrily about me. I have never had any quarrel or dispute with him, or had an angry word with him until he called at our 2453 house in Sixteenth street, in February, 1850. I have seen the copy of an affidavit made by Mr. Forrest in this action, before Thomas S. Sommers, Commissioner of Deeds, on the fifteenth of November last. I am sure that Mr. Forrest has no reason to believe, nor can I

think that he does believe me to be, in any respect or degree, the character he has described. The first extract given by Mr. Forrest is as follows :

2454

“ Willis’ House, May 8th.

“ Mrs. Willis and I are consoling ourselves that they
“ are both boys, and must expect women to deceive
“ them all their lives.”

This arose from the following circumstances. Early in May, 1848, I called to inquire after the health of Mrs. Willis, and was informed of the birth of a fine boy,
2455 who, however, was actually perishing of hunger. Mrs. Willis being unable to nourish him, and the whole family being employed in efforts, so far useless, to find a proper substitute, I immediately offered to nourish the child myself, and did so for some days, until a nurse was found. Mrs. Willis’ child being very weak, some management was necessary with him, and to induce my child to draw nourishment from Mrs. Willis, in order to restore to her the power of sustaining her own infant, an artifice was practised upon him with but partial and temporary success. I succeeded in saving the life of
2456 my friend’s child, which gave me infinite pleasure, and knowing my sister to be in very low spirits, wrote her the liveliest letter possible, and in the extract given made allusion to the artifice so practised upon the children.

The second extract is as follows :—

“ When I went home this evening, the C.’s came to
“ see me, awfully disappointed that you will not return
“ till so late. It’s all settled about Lizzie, Dr. Hull,
2457 “ &c., &c.”

This extract is unintelligible to me ; and I do not believe that Mr. Forrest has, or that I ever wrote such a letter. I know no one to whom I could have alluded by the initial given ; I might have written about its being all settled that “ Lizzie,” that is to say, Miss Eliza-

beth Gray, the daughter of Dr. Gray, a highly respectable physician, was about to be married to her present husband, Dr. Warner.

The third extract is as follows :—

2458

“ Dear Catten, things are changed since I wrote you
“ from R. street, that she had that trick, and added, that
“ if all tales were true, the original wanted rather a big
“ frame just now.”

I think this must be misrecited ; the words are not accurately given ; but I did write something resembling this ; its subject is as follows : When we lived in Reade street, in 1839, some of us taught my little sister Virginia, before going to bed, to bid good night to Mrs. Forrest's portrait, as I had previously done in England. 2459
Just before the birth of Mrs. Forrest's second child, I wrote to her mentioning this ; the allusion to the size of the original, was meant as an inquiry in reference to the birth which I had heard was expected. Again, in 1848, I wrote something like this third extract, reciting my letter of 1839, in connection with a statement that my only little boy—now, in 1848—was in the habit of saluting this same picture of his aunt, in the evening.

The fourth extract is as follows :

“ Speyer has just been here, and Frank opportunely 2460
“ cleared out. He says I have behaved very badly—
“ devilish awkward to tell him how badly. He has not
“ heard that I was married within a month of his de-
“ parture. Well, least said's soonest mended. He is
“ dying to see you, and was quite flattered at your
“ writing out a paragraph about him. He has changed
“ his mind, and is going to stay here some months. He
“ says he wishes he had taken F. with him.”

“ Frank” and “ F.” mean my husband ; the other person named is a highly respectable gentleman ; it was said he was a suitor of mine, before my marriage. I

do not believe that I ever wrote precisely as stated in
 2461 this extract, or to the like effect, although it is possible
 that Mr. Voorhies may have written so in a letter of
 mine. Mrs. Forrest never wrote any thing about this
 gentleman, to my knowledge or belief. The word must
 be "cutting," not "writing." She cut out of a news-
 paper a complimentary article about him, and sent it to
 me. He had been engaged in the Mexican war, and
 Mr. and Mrs. Forrest, and myself, took considerable in-
 terest in his adventures.

The sixth extract is not true. I did not write as
 therein recited. I once wrote to my sister, something
 2462 like it. I wrote that I desired to consult Mr. Magoon,
 a clergyman, for whom I then had a high esteem. I
 did not conceal his name, but wrote it out at length.

The seventh extract is as follows :

"Wednesday, May 17th. Damned bad marriages
 "seem to be the order of the day in our family ; Frank
 "never reads any of your letters. I do wish you would
 "come home ; I am so tired of everything and every-
 "body."

2463 At the time Mr. and Mrs. Forrest were married, my
 mother's step-father observed, in reference to Mr. For-
 rest, "handsome enough man, but damned bad marri-
 age," which speech was repeated to Mr. Forrest, who
 laughed about it, and often repeated it himself, in refer-
 ence to improvident marriages, saying, "there's another
 damned bad marriage." This extract was in reply to a
 letter of my sister's, written upon the anniversary of
 our mother's marriage to our father, whose circumstan-
 ces were much inferior to her own. In allusion to that
 marriage, and to my own, which was to a man without
 property, I wrote playfully, as recited, quoting the
 words Mr. Forrest so habitually used, and inserting the
 quotation marks.

As to the extract in these words :

"I will probably go out in the morning, and spend a
 "confounded ten-dollar piece, which le Cpte. gave her, 2464
 "for money loaned some time ago."

I must say that they cannot have been taken from
 any letter of mine. I never wrote it, nor any thing
 like it.

The last extract given in Mr. Forrest's affidavit is not
 a true copy of any letter or letters of mine. I never
 could have written all the matter therein recited. Some
 of it I did write, but the parts which were writ-
 ten by me could not have been all written in the same
 letter, or at the same time.. The allusions to "privacy" 2465
 and "talk," were written by me, in reference to my
 marriage, which was very private, and was for a time
 conceal'd. I knew no Mr. K.; but I did know Mrs.
 Kirkland. The allusions to persons and to visits
 refer to very respectable persons, and to the visits
 connected with the announcement that my marriage
 had taken place some time previously, and had not
 been made public. The cards alluded to were my
 visiting cards, "Mrs. Frank Voorhees." If there is
 any letter of mine about "the Chelseaites" be-
 ing "rampant," I believe these words were written
 by Mr. Voorhees. He had for the moment a little 2466
 dispute with some of his friends there, about his
 keeping secret of our marriage, but which was after-
 wards fully reconciled. He was quite in the habit of
 writing in my letters, and interlining his observations
 with mine. I have been for seven years back subject at
 times to a weakness of the intercostal muscles, occa-
 sioned by overexertion in singing, aggravated in the
 first instance by a severe cold. I have been uniformly,
 from the first, treated for this affection by Dr. Gray.
 Any considerable exertion in singing is apt to produce
 it. It was to this I alluded in the remarks about the 2467
 lower muscles, and which were probably written by me.
 I might have so written at any time within the last

seven years. Whilst Mrs. Forrest was in Europe, she wrote me to send her a daguerreotype likeness of myself. I had one which she had paid for, and which was considered her property. I replied to her that Mr. Frank Voorhees, who was then absent in the South, had it with him, and when he returned to New York, I would get it and send it to her. I never knew that any gentleman had a daguerreotype likeness of Mrs. Forrest, or which had been taken from her husband's house ; nor
 2468 did I ever allude to any such transaction in any letter or otherwise. Mrs. Forrest never made parties for the purpose of bringing or endeavoring to bring me into society, or to change any feeling existing towards me. The insinuation of Mr. Forrest in his said affidavit, that I am living apart from my husband, is wholly unfounded. We are as much united as any married couple can be, when the business of the husband obliges him to be temporarily absent from his residence. Although I lived in Mr. Forrest's house for seven years, I always treated him with the greatest possible distance and re-
 2469 spect. I seldom addressed him, unless when spoken to ; I never introduced any subject of conversation he was supposed to dislike ; I never entered the library, where he commonly sat, unless expressly invited. Whilst he was at home, and I was living in his house, weeks would sometimes elapse, with scarcely a word passing between us, and sometimes days would pass, without my even seeing him.

Previously to Mr. Forrest's departure for Europe, in 1844, I was quite satisfied with this state of things ; he being greatly my senior, and, as I conceived, my mental
 2470 superior ; and he being in the habit of speaking of me to my friends with much respect and apparent affection. After Mr. Forrest's return from Europe, and especially after the arrival of Mr. Macready in this country, he seemed to dislike meeting even his most esteemed friends ; seldom received those who visited him, and in every way

showed and acknowledged himself to be in a most irritable and unhappy state of mind. Nevertheless, he always recognized me and my husband, when we met, and exchanged greetings with us as usual ; and we constantly accompanied Mrs. Forrest to the theatre, when Mr. Forrest acted. Mr. Forrest never forbid me to enter his house, nor expressed any wish that I should not do so, to my knowledge ; nor do I believe that he ever had any wish or intention of the sort, prior to the autumn of 1849. 2471

Mrs. Forrest was almost constantly occupied in attendance on Mr. Forrest, when he was at home ; and I was equally occupied in my profession as a teacher of music, and with the care of a young baby. Hence we naturally met if possible in the evening, and to a considerable extent availed ourselves of the opportunity of meeting afforded by Mr. Forrest's short absences, at which times only, Mrs. Forrest had any leisure. 2472

About the 20th of January, 1849, Mrs. Forrest informed me that Mr. Forrest had expressed his determination to put her away from him ; and that the alleged cause was her having insulted him by a flat contradiction. I never heard of any other cause being alleged previously to December 24th, 1849, nor did I ever state before that date to any one that the separation between Mr. Forrest and his wife arose from her opposition to his course in his controversy with Mr. Macready ; or that there was any connection in any way whatever between such controversy with Mr. Macready and said separation.

Excluding from the remark intimate personal friends of Mr. Edwin Forrest, whom he brought to his home and introduced to his family whilst I was a member of it—and against whom I do not mean to say a word—my associates and associations have been and are perfectly respectable ; and I am quite confident that Mr. Forrest cannot produce a credible witness 2473

who will depose to, the contrary, or prove that Mr. Forrest himself ever impeached my conduct in that respect until the present year (1850), before which time, that is, in December, 1849, he had charged his wife with impurity, and set on foot measures for obtaining a
2474 divorce.

The gross charges against me contained in Mr. Forrest's affidavit have been published in the newspapers. I am warranted in believing that this was done by his agency. The publication has preceded their reading in court. I am sure his counsel would not do it; it must therefore have been himself; and in the act I witness that impatient eagerness to crush the feeble when standing in his way, for which Mr. Forrest is distinguished. I am without a protector in this country, and, for the support of myself and child, am in a large degree de-
2475 pendent upon employment in my profession. That employment I cannot retain if the pure and respectable persons who afford it to me shall see reason to deem me unworthy. I cannot know, though I may hope, that the rude language employed by Mr. Forrest will defeat his object, and alone discredit his assertions. Under these circumstances, I consider it due to my absent husband, to my boy, and to our kind friends, to repel Mr. Forrest's charges, and to show his motives for making them.

I am no relative, and hope soon to be no connection of Mr. Forrest; and, therefore, the delicacy which becomes a woman, and my sense of justice, alone impose restraints upon my defence. Fear of him can have no influence, for I know he will do his utmost to wound
2476 and injure me.

According to the best of my knowledge, information and belief, the causes of Mr. Forrest's ill-will to me, and of his attack upon me, are hereinafter truly stated.

In the fall of 1848, when he first actually manifested ill-will to me, he was engaged in a violent contest with

Mr. Macready. His ungovernable self-will led him to draw into the vortex he was creating all whom he could reach ; and in the progress of that feud, every one within the sphere of his observation whom he suspected of withholding a full approval of his measures became at once the object and, as far as his power went, the victim of a malice that knows not how to spare. His efforts to this end involved our city in a scene of havoc unheard of in its previous history, and sent sorrow and 2477 desolation to many homes besides his own.

I believe that my sister did not go with him in all things connected with that ill-starred controversy, though the affection and the condition of a wife led her to go perhaps further than she can now fully justify. Mr. Forrest perceived that her sense of propriety revolted at some of his acts. In this, his exacting and imperious temper saw a failure of fidelity not to be endured. Knowing that, beside himself, she had none but her sister to love and confide in, he determined to exclude her from all intercourse with that sister, hoping there- 2478 by to reduce her to complete subjection. I presume my sister did not see his object, or fathom its depth ; at all events, she resisted, and the consequence was a separation. After this event, Mr. Forrest soon became a wanderer, without home, family, or occupation, and tasted that weariness of his condition, which my sister, and I more than she, had fondly hoped would cause his return. Had she, when put away by him, sat down in sack-cloth and ashes, and made the tale of her intolerable grief and regret a town talk, it is possible that Mr. Forrest's vanity would have been propitiated, and his restoration to his family effected ; but her course was different. She made a home for herself and me ; we three sisters with my little child made a cheerful and 2479 happy family circle ; our mutual presence afforded protection against scandal ; our mutual kindness sweetened toil, and afforded a degree of compensation for all priva-

tions and disappointments. Mr. Forrest perceived this, and contrasted our condition with his own ; he could not retract the fiat of separation—egotism forbade that ; he had no resource but our destruction. From that moment, his hatred against me became extreme, and hence, his affidavit against me : he has not spared my little child, and our youngest sister has merely the advantage
 2480 of being libelled in the form of prophecy.

MARGARET E. VOORHEES.

Sworn to, Dec. 19, 1850, }
 before me. }

IRVING PARIS,

Commissioner of Deeds.

SUPREME COURT.

CATHARINE FORREST,

vs.

EDWIN FORREST.

City and County of New York, ss.

I, Samuel Marsden Raymond, being duly sworn, say that I have read printed papers in the New York Herald, purporting to be copies of affidavits made by one Christiana Underwood, and by one Robert Garvin, both
 2481 taken before John Livingston, a Commissioner for Pennsylvania, in New York, on the twenty-eighth day of February last ; and in reply to the same, I do depose and say, that the statements therein contained in relation to myself are untrue in almost every particular, and that every imputation and inference of unchaste, criminal, or immodest conduct between myself and Mrs. Catharine N. Forrest is wholly and absolutely unfounded.

During the absence of Mr. and Mrs. Forrest in Europe, and before I became acquainted with either of them, I was in the habit of visiting at their house a lady, then single but now married, who is a near relation of Mrs. 2482 . Forrest; my attentions to that lady were well known, and were of the most honorable kind. This circumstance placed me in more intimate relations with Mrs. Forrest than would otherwise have existed. I never slept at Mr. Forrest's house, except one night: it was at a time when it rained violently, and at a very different time from that alluded to by Mrs. Underwood. On that occasion, I slept in a room which my sister had occupied during a visit of a fortnight at the house, and with which therefore I was familiar. I recollect no particular circumstance about the bedclothes or bed, but I 2483 presume and believe the bed was in usual order, and that I slept in it in the usual way. One thing is certain, I did not see Mrs. Forrest that night after quitting the drawing room, and I slept in that bed in that room during the night; and any insinuation to the contrary is absolutely false. I did not, to the best of my recollection, go out of the house until after breakfast; and I never at any time left or entered Mr. Forrest's house in any unusual way. I was surprised to read in these affidavits that Mr. Forrest himself observed and exacted early hours. I always understood from his 2484 friends that late hours were agreeable to him, as they are natural to his profession, and I know that I made his acquaintance by calling on him at his house at half-past ten, P. M., and staying until half-past one of the morning.

I never saw, or suspected, or heard it hinted, that Mrs. Forrest was excited with wine or liquor; I never saw anything immodest in her deportment; it is my firm conviction that no one who is personally acquainted with Mrs. Forrest can believe in the charges made against her manners and morals. To the best of my

knowledge and information, and as I verily believe, Mrs. Forrest is a chaste and virtuous woman, and has never
 2485 committed adultery or any immodest act whatever.

After Mr. Forrest and his wife had separated, and Mrs. Forrest and her two sisters were living together in Sixteenth street, and Mr. Forrest had publicly accused me—by reason of the entire innocence and rectitude of my conduct, and my belief in their purity, and the undoubted excellence of their conduct and associations, I deemed it not merely allowable, but in some sense a duty on my part to continue my acquaintance with them. Shunning them might seem a tacit admission of some impropriety. I had full information that
 2486 some person or persons had usually watched their residence in the evening, and occasionally dogged persons from the door, and behaved rudely towards them.

On the evening of the fifteenth of June last, I visited Mrs. Forrest and Mrs. Voorhees. During all the time I was there we three were together in the front parlor, and during most of the time, one or the other or both of the ladies were singing, or one of them was playing on a piano. I presume this could be heard in the street. It was not more than half-past eleven o'clock
 2487 when I left, which I did not regard as too late to stay on a summer's evening. I then left the house—not stealthily, or in any other way than openly, directly, and fearlessly. The moment I stepped on the stoop, I saw a stout-looking figure standing near a tree on the opposite side of the street. I passed on slowly, looking at this figure, and assuming it was one of the watchers. As I turned on the sidewalk, it crossed the street hurriedly, and approached me behind. I instantly turned round, and saw a man about six feet from me. He stopped, and in a tone of real or assumed anger, and very husky and agitated, said: "What's your name?" I replied: "Raymond." He then approached a step or two, so that
 2488 we stood front to front, within fair striking distance,

when I saw in his hand a stick or other similar instrument, apparently having a head ; I supposed it to be a loaded whip or stick, the end opposite to the head being in his hand. This person was Edwin Forrest, a man who cannot lack many pounds of being twice my weight, but whom, on fair terms, face to face, in open day, I do not fear to meet on any occasion. The following dialogue took place:

Forrest.—"You are one of the damned villains that have betrayed me." 2489

Raymond.—"It is untrue, Edwin Forrest, that I ever wronged you in any way."

Forrest.—"Yes, you have ; I have been looking for you, but never could find you. I have a terrible reckoning with you and some others. I have marked the damned scoundrels, and will have vengeance on every one of them. Damn you, you have been in there, to-night, (here a present participle was used) Mrs. Forrest."

Raymond.—"Edwin Forrest, do you pretend to believe what you say?" 2490

Forrest.—"If you did not you have at other times. They are both damned whores. What right have you to make my house a whore-house? Why would you go there, unless you were guilty and obliged to go?"

Raymond.—"I am innocent, and not afraid to go. You have implicated a large number of Mrs. Forrest's friends, and by making such charges, you would cut her off from all her friends, if they acted as you seem to desire."

Forrest.—"You sneaked away from the house, like a guilty man." 2491

Raymond.—"I did not sneak away, Mr. Forrest. I knew the house was watched. I saw you as I left the door, and I supposed it was some one employed by you to watch."

Forrest.—"You are a damned coward ; you are a liar, and a coward."

Raymond.—"Edwin Forrest, you have waylaid me, by night, with a bludgeon. You want a pretence for attacking me. I shall not give it you."

Forrest.—"Bludgeon! I don't want a bludgeon to kill
2492 you. God damn you, I can choke you to death with my hands."

Raymond.—"Perhaps you could, and you are armed, too."

Forrest.—"You are not the man I am after, this time. If I catch that damned villain, I'll rip his liver out. I'll cut his damned throat at the door. If I was through with my suit, I would cut your damned throat on the spot. I'll let you go, this time; but, damn you, your time will come yet; I've marked you, all of you; I'll have vengeance."

Raymond.—"I understand Mr. Forrest that you yourself admitted since this business commenced, that
2493 you did not believe anything criminal had occurred between Mrs. Forrest and me."

Forrest.—"I never said so: it is a lie—I demand your author." I deferred giving this information, and here said Forrest made certain gross charges against a lady other than his wife, which were altogether untrue, and which are too gross to be repeated—even in the detail of a conversation such as the preceding, and added—"I will write Frank Voorhees to-morrow, and if he is not a damned coward he will come home and cut your throat."

2494 The present participle aforesaid used by said Edwin Forrest, as stated in the above recital, was of the most gross and vulgar kind; for which reason I omit it.

My second answer above given was given under some surprise and my tone was somewhat agitated, but certainly not more so than that of said Forrest on asking my name. My voice at that moment and for an instant was tremulous with the excitement of surprise, but in no other respect or degree. It is not true that I fal-

tered forth an attempted explanation, nor was my voice disturbed at any other time in said interview, nor did I at any time in said interview, or ever in presence of said Edwin Forrest tremble. I never admitted that I 2495 stole secretly from said house or gave any reasons for so doing, nor did said Forrest ever state in my presence that the law should have its course with me. His language was that of personal threatening. On the next Monday I informed Mr. Forrest of my views of this interview by letter. I have never heard from him since, except that once, as I am informed and believe, he professed to be looking for me at the office of the Evening Post, where I am very seldom. He knew my address. By stating these facts I do not mean to have it inferred that I ever thought of a duel with Mr. 2496 Forrest.

Immediately after Mr. Forrest came up to me, a short thick-set man came up by his side and stood there listening to the conversation. He said nothing until Mr. Forrest had gotten through, and then he approached me closely, looked me in the face, and said "I want to mark you." I desired to see him, and asked him to walk with me to the lamp near by. He replied, "I shall know you when I see you," and turned away and rejoined Mr. Forrest. Mr. Forrest and his man walked away from me towards the door of Mrs. Forrest's house, and I saw no more of them. 2497

SAMUEL M. RAYMOND.

Sworn to before me, this 5th day }
of December, A. D. 1850. }

FRANCIS H. UPTON,
Commissioner of Deeds.

IN THE SUPREME COURT OF THE STATE
OF NEW YORK.

| | |
|-----------------------|---|
| CATHARINE N. FORREST, | } |
| Plaintiff, | |
| <i>against</i> | |
| EDWIN FORREST, | |
| Defendant. | |

State of New York, }
City and County of New York. } ss.

2498 *William A. Howard*, of Boston, in the State of Massachusetts, but at present in the city of New York, being duly sworn, doth depose and say, that he is well acquainted with Edwin Forrest, the above named defendant, and has been on intimate terms with said Forrest for many years past ; that deponent was acquainted with said Forrest for some time prior to his marriage with his wife, the above named Catharine N. Forrest.

After the marriage of the said Edwin Forrest and the said Catharine N. Forrest, deponent, from his previous
2499 acquaintance with the said Edwin Forrest, was introduced to her, the said Catharine ; and, on the invitation of the said Edwin Forrest, was in the habit of visiting them upon familiar terms of friendship, at their residence in Twenty-second street, in the city of New York.

And this, deponent further saith, from the time he first became acquainted with the said Catharine N. Forrest to the present time, he never knew, or suspected the said Catharine to have been guilty of any impure or improper conduct with any person whomsoever ;
2500 but from his acquaintance with the said Catharine, and from his observation of her conduct, so far as he has any personal knowledge and as he verily believes, the said Catharine N. Forrest has always conducted herself,

as the wife of said Edwin Forrest, with virtue and purity.

And this deponent further saith, that he has seen with astonishment, published in the public newspapers, a certain libel and petition signed by the said Edwin Forrest, addressed to the honorable the Judges of the Court of Common Pleas of the city and county of Philadelphia, in the State of Pennsylvania; in which said libel and petition of the said Edwin Forrest, it is most untruly alleged and stated, amongst other things, that the said 2501 Catharine N. Forrest hath been guilty of adultery with this deponent, which allegation and statement this deponent most unqualifiedly says is wholly destitute of any foundation in truth, and made, as this deponent verily believes, for the purpose of calumniating this deponent, and as he knows of his own knowledge, is a libel upon the said Catharine N. Forrest.

And deponent further says, that the said Catharine N. Forrest never was guilty of any unchaste, impure, or immodest conduct with this deponent, nor in his presence; nor hath he any knowledge or belief that she was 2502 ever guilty of any such conduct with any person or persons whomsoever.

And this deponent further saith, that during the residence of the said Edwin Forrest and Catharine N. Forrest in Twenty-second street, in the city of New York, he, this deponent, upon the invitation of the said Edwin Forrest and wife, was frequently in the habit of visiting them at their said residence upon terms of familiarity and friendship, and upon the invitation of the said Edwin Forrest, has frequently passed the night at the residence of said Forrest; the said Edwin Forrest being at 2503 home at the time; that deponent never remained over night at the house of said Forrest during his absence, except on one occasion, when he was on a visit there in company with some friends and acquaintances of the family, and it came on to storm, and the public convey-

ances having stopped running, he remained over night ; that another gentleman of this city, who was a friend of said Edwin Forrest, also remained there that night for the same reasons.

And this deponent further saith, that he sails this day from the port of New York, bound on a voyage to Cha-
 2504 gres, in Central America, and from thence he will proceed to California, upon business, where he expects to remain for a period of about one year.

W. A. HOWARD.

Subscribed and sworn to this 10th day }
 of September, 1850, before me, }

WM. MITCHELL,
 Justice Supreme Court.

SUPREME COURT.

CATHARINE N. FORREST

agst.

EDWIN FORREST.

City and County of New York, ss.

2505 *Nathaniel Parker Willis*, being duly sworn, says as follows :

Mrs. Catharine N. Forrest, the wife of Edwin Forrest, never has, in any instance, committed with me, or suffered on my part, any unchaste or immodest act whatever. I never pretended to take any liberty whatever with her person, nor ever conducted myself towards her in any other manner than the strictest observance of purity and decorum, on her part and my own, required.

Prior to the first arrival of Mrs. Forrest in this coun-
 2506 try, I had made Mr. Forrest's acquaintance in the way of my profession, and had, for years, valuably and

consistently favored his promise as an actor. I continued to do so, till after his separation from his wife. Mrs. Forrest has been on terms of intimacy and friendship with my wife, and continues so to be up to the present moment. I have called on Mrs. Forrest with my wife and alone, but never under any circumstances which could offend the strictest sense of propriety or morality; nor do I believe, that at the time of any such visit, any human being imagined the existence of any impropriety in action or motive. All that has been asserted by Mr. Edwin Forrest, Mrs. Underwood, Robert Garvin, or any one else, to the contrary of the preceding statement, is utterly untrue.

N. P. WILLIS.

Sworn before me, this 9th }
day of December, 1850, }

JAS. G. PHELPS, Jr.,
Com'r of Deeds.

SUPREME COURT.

| | |
|-----------------------|---|
| CATHARINE N. FORREST, | } |
| <i>against</i> | |
| EDWIN FORREST. | |

City and county of New York, ss.

2508

Henry Panton, of said city, being sworn, says as follows :

I am well acquainted with Mr. James Lawson. I have had frequent conversations with him about the above named Mr. and Mrs. Forrest, since their separation was first generally understood to be in contemplation. About March, 1849, before said separation had occurred, Mr. Lawson informed me that it was about to take place. He also then stated to me that he had in-

quired of Mr. Forrest whether such expected separation
 2509 was on account of any improper conduct of Mrs. Forrest,
 and that said Edwin Forrest had, in reply, pledged his
 honor to him, Lawson, that he had nothing against Mrs.
 Forrest.

After the said parties had actually separated, and in
 the summer of the year one thousand eight hundred
 and forty-nine, the said Lawson repeatedly stated to me
 that said Edwin Forrest had a very great affection for
 his wife, and was very unhappy on account of the sepa-
 ration ; and that Forrest would feel better if there was
 some definite charge against her that would lessen his
 affection for her.

2510

HENRY PANTON.

Sworn before me, this 5th day }
 of December, 1850. }

By HENRY PANTON,

J. M. BALDWIN,

Comr. of Deeds.

SUPREME COURT.

| |
|-----------------------|
| CATHARINE N. FORREST, |
|-----------------------|

| |
|----------------|
| <i>against</i> |
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|----------------|
| EDWIN FORREST. |
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City and County of New York, ss.

Felix O. C. Darley, of the city of New York, artist,
 being sworn, says as follows :

2511 I know Mr. James Lawson, and have met the above-
 named Mr. Forrest at said Lawson's house. About May,
 1849, I was on a fishing excursion with Mr. Lawson, on
 Long Island ; the existing separation of Mr. and Mrs.
 Forrest was then a subject of general conversation. I
 asked Mr. Lawson whether he had any conversation

with Mr. Forrest on the subject, and whether he (Forrest) had any charges against Mrs. Forrest. He said he had spoken with Mr. Forrest about it, and that Forrest had replied that he had no charge against her, and that he would like to see the man who would dare to make any. These are the precise words, as I best recollect them; the meaning and import of his words 2512 are precisely as above stated.

F. O. DARLEY.

Sworn before me, this 5th }
day of December, 1850. }

By F. O. DARLEY,

J. M. BALDWIN,

Comr. of Deeds.

To the Editor of the New York Herald.

Having read the statements published in your paper of the 28th of March, in reference to Mr. and Mrs. Forrest and myself, I deem it my duty, not with a view to my 2513 own vindication, to explain certain matters which may throw more light upon the subject than it has otherwise received.

In 1848, I was engaged by Mr. Forrest and Mr. Bates jointly, to perform with Mr. Forrest at the National Theatre, Cincinnati. During that engagement a difficulty of a professional nature arose out of a request from Mr. Forrest that I should perform an inferior character, one which did not belong to the position I held with him in other plays. This request caused an estrangement between myself and Mr. Forrest, which prevented 2514 me for a time from visiting, as I had previously done, Mr. Forrest's apartment. Meeting Mrs. Forrest in the hall, on my way from my own room, one morning when Mr. Forrest was absent at rehearsal, the lady invited me to enter the parlor that we might converse upon the

nature of the difficulty between her husband and myself. Discovering that I felt degraded professionally and was writhing under the necessity of enduring it, she sought in the most kind manner to soothe and console me. I had several interviews with her of a like nature, which
 2515 resulted in my speaking to Mr. Forrest. The cause of the difficulty was canvassed, Mr. Forrest making it appear that the stage-manager, and not himself, was in fault, so the matter was adjusted. A short time after this, Mr. John Bates and Mr. James Bates, his son and partner in business, assured me that it was by Mr. Forrest's express desire and will that I was "cast" the character in question. Upon this assurance, I resolved that when my engagement ended with Mr. Forrest, I would never again hold any friendly communication with him. Under this state of excitement, and feeling great re-
 2516 gret at parting with Mrs. Forrest, whose society had been most agreeable to me, I wrote, after having indulged rather freely in wine, the silly, yet culpable rhapsody addressed to "Consuelo." I scarcely remembered at the time it was handed to the lady what it contained, and was afterwards under the impression that it was merely some lines of rhyme bidding her farewell, and have since been under that impression until I read the original shown me by Mr. Holbrook, of the Picayune, about an hour previous to my departure from New Orleans. The paper was handed by me to Mrs. Forrest on board the Pittsburgh boat, when I desired that she would not read
 2517 it until after leaving the city. I mention this merely to show that it was no fault of Mrs. Forrest that she accepted a paper, the contents of which she did not know. The fault was mine alone, and I have no excuse to offer other than the one above stated, which is, I am fully aware, no excuse at all ; I have been guilty of a wrong and do not seek to exonerate myself from any censure. or to avoid any consequences my conduct may have deserved.

Mr. Forrest has certified, "that he entered his private parlor in the City Hotel at Cincinnati, and found Mrs. Forrest standing between the knees of the said Jamison, who was sitting upon the sofa with his hands upon her 2518 person." When Mr. Forrest entered his private parlor, in the City Hotel at Cincinnati, on the occasion alluded to, I *was* sitting on the sofa, about the centre of it, and Mrs. Forrest was standing at the end of it, with one hand upon it and the other resting upon the back of a chair, listening to something I was saying in reference to the subject of phrenology. Mr. Forrest did *not* ask "what it meant," as he has stated in his affidavit; Mr. S. S. Smith was present, and can certify that he did not hear Mr. Forrest ask such a question. 2519

It is stated by one of Mr. Forrest's witnesses that Mrs. Forrest had written to me. It is true that she did write to me, but not at the time specified, or, if so, the letter was not received by me. The communication I did receive was written shortly after that lady's arrival at Pittsburgh, in which I received, not "a gentle rebuke," but a very decided one, as to the tone of the language applied to her under the title of "Consuelo." It promised, however, that I should be forgiven on condition that I should never name having written to her, and that instantly upon reading I should burn her letter, which I did. Since that time, I have never received 2520 any communication from, nor written any to Mrs. Forrest. On the day of Mr. and Mrs. Forrest's departure from Cincinnati, a few minutes previous to leaving the hotel for the boat, Mr. S. S. Smith entered with a music book for Mrs. Forrest. All their trunks and baggage being fastened, a difficulty presented itself as to how to dispose of the book, I being present, begged to take charge of it until my arrival at New York, which was acceded to. According to promise, when I reached that city I called upon Mrs. Forrest and presented the book; 2521 I was received cordially, but with a marked propriety

of distance by the lady, I felt this rebuke severely, but I also felt that I had deserved it, and left the house with as contemptible an opinion of myself as thousands for the last few weeks have had reason to entertain of me. In conclusion, I again state that I do not seek for any covert to hide me from the storm of contempt, derision, or punishment my conduct has merited ; but let me also solemnly assert, that if I knew a means whereby I could expiate my offence and heal the peace of
 2522 mind of those who are suffering through me, I would gladly serve double their term of wretchedness.

G. W. JAMISON.

The State of Ohio, }
 Cuyahaga County. } ss.

Personally appeared, George W. Jamison, who made oath that the above statement, by him subscribed, was true.

Before me,

2523

JNO. C. GRANNIS,
 Notary Public.

Cleveland, April 19th, 1850.

SUPREME COURT.

CATHARINE N. FORREST,

against

EDWIN FORREST.

City and County of New York, ss.

Isabella J. Sinclair, residing at No. 192 First Avenue, in the said city, being duly sworn, doth depose and say :

That she knows Christiana Underwood, who formerly resided in the family of Edwin Forrest and Catharine N.
 2524 his wife, and has been acquainted with her for upwards

of three years last past. On the 17th of April last, deponent saw and conversed with the said Mrs. Underwood, at number 118 West Sixteenth street, in said city, when Mrs. Underwood asked deponent if she had seen the affidavit published in the newspapers, which she had made, in the application for a divorce by Mr. Forrest, before the Pennsylvania Legislature. Deponent replied that she had seen and read it. Mrs. Underwood said, that whilst Mr. Forrest was in the South, in the winter or spring of 1848, she, Mrs. Underwood, called upon James Lawson, of said city, for money, who at first declined to give it to her, in consequence of which she had been compelled to pawn her jewelry; shortly after which, she again called upon said Lawson, and told him what she had done; that she, Mrs. Underwood, was then angry and excited, and when in that state she communicated to Mr. Lawson some of the circumstances contained in her said affidavit against Mrs. Forrest; that the said Lawson then gave her the money for which she had made application, and that she had thought no more about the circumstance, until said Lawson called upon her in the winter of 1850, with a paper, on which he had written down the circumstances which she had communicated against Mrs. Forrest, in the winter or spring of 1848; that said Lawson then wanted her to make an affidavit, detailing the circumstances which he had written on the paper; that shortly afterwards, said Lawson and Mr. Forrest called upon her, and pressed her to make the affidavit, and that to prevent her from being called a liar, in regard to the statement which she had made to said Lawson, in the winter or spring of 1848, she was compelled to make the affidavit against Mrs. Forrest; that when Lawson and Forrest so called upon her, they both told her that any statement which she might swear to, would be kept a secret, and would never come before the public; that afterwards Mr. Sedgwick, the lawyer of Mr. Forrest, called on her and

had her affidavit already drawn up, and that she had nothing to do but to sign it; and that Mr. Forrest afterwards called upon her again, and asked her to go to the Astor House, which she accordingly did, and when she got there she found Mr. Forrest and his lawyers there.
 2528 And this deponent further says, that she is nowise related to or connected with Mrs. Forrest.

ISABELLA J. SINCLAIR.

Sworn to, this 7th day of }
 December, 1850, before me, }

C. B. WHEELER,
 Comr. of Deeds.

SUPREME COURT.

CATHARINE N. FORREST,

against

EDWIN FORREST..

State of New York, }
 City and County of New York. } ss.

2529 *Catharine Mooney*, of said city, aged eighteen years, being duly sworn, says:

That she knows Edwin Forrest and Catharine his wife, and was a domestic in the employment of the former, during the months of January, February, March and April, one thousand eight hundred and forty-nine. This deponent says, that the said Edwin Forrest manifested a remarkable degree of tenderness and affection towards his said wife, at times, during the period aforesaid, and especially in and during the said month of April, and so much, that this deponent would not believe that the separation would take place, which she
 2530 had heard of, for nearly all the time aforesaid, as being

in contemplation. And deponent further saith, that she knows Andrew Stevens. On the twenty-second of February, of the present year, deponent met said Stevens, in Broadway, near Great Jones street, in the city of New York, when said Stevens stopped deponent, and asked her what Mrs. Forrest was doing, to which deponent replied that she was keeping house as usual; said Stevens then said to deponent that he would give deponent a sum of money, if she would make a statement, or tell things against Mrs. Forrest; to which offer deponent replied, that she did not want his money, and 2531 that she knew nothing against Mrs. Forrest.

CATHARINE MOONEY.

Sworn to, this 7th day of
December, A. D. 1850, }
before me,

C. B. WHEELER,
Comr. of Deeds.

SUPREME COURT.

CATHARINE N. FORREST,

against

EDWIN FORREST.

City and County of New York.

2532

Nelson Chase, one of the attorneys for the plaintiff in this action, being sworn says, that on being served with what purported to be a copy of an affidavit of the defendant, and a notice of a motion to dissolve the injunction in this cause, he observed in such affidavit a statement purporting to give an account of certain proceedings of the Legislature of Pennsylvania upon the application of the defendant for a divorce, and referring

to the legislative action of two senators of that State upon such application.

2533 This deponent, as the attorney of the plaintiff, thereupon wrote letters to both of those senators, enclosing them an extract from that part of the affidavit which referred to them, and the proceedings before the Pennsylvania Legislature, and deponent has received from Senator Walker a letter, a true copy of which is hereunto annexed, marked **A** ; and also a letter from Senator Brooke, a true copy of which is hereunto annexed, marked **B**. (See them at pages 759 and 762.)

And this deponent further says, that the statements contained in Mr. Walker's letter, relative to the votes of the Pennsylvania Legislature upon the application
2534 of the defendant for a divorce, correspond, substantially, with the uniform tenor of numerous public prints published at the time, giving the votes of the Legislature upon the application of the defendant for a divorce before that body ; and deponent believes said letter to be true.

And this deponent further says, that the affidavit of William H. Howard, taken before the Honorable William Mitchell, one of the judges of this court, on the 10th day of September, 1850, was taken under the following circumstances :

2535 The said Howard, immediately previous to the taking of said affidavit, was residing in Boston, and deponent having heard that he was about to leave and go on a voyage to California, had made arrangements to examine him as witness in this action as he passed through this city on his way to Chagres, but said Howard did not arrive in New York until the morning of the day on which he was to leave the city in the steamer for Chagres, and deponent therefore was unable, from want of time, to have said Howard examined as a witness in this cause ; but said Howard made his said affidavit only
2536 an hour or two before he left New York on his said voy-

age, and is now, as deponent is informed and believes, in California.

NELSON CHASE.

Sworn to, December 13th, }
1860, before me, }

D. HOBART,

Commissioner of Deeds.

A.

ERIE, November 20, 1850.

Messrs. Howland & Chase,

Gentlemen :

Your favor, covering an extract from the affidavit of 2537 Edwin Forrest, is received. I should take no part in the legal proceedings now progressing in your city between Mr. and Mrs. Forrest. I mean I should make no affidavit unless absolutely necessary. I have, however, no hesitancy in saying, that my feelings and sympathies are with Mrs. Forrest ; so much so, that what I can honorably do out of the suit, I will cheerfully do. I have with care and with much astonishment, read the extract you enclosed me ; I must say, that Mr. Forrest is much mistaken in attributing my opposition to his bill, to my being his personal and political enemy. He 2538 does me, in this, great injustice. It was not a party question ; nor was any divorce that was before the senate. I opposed, with all my power, the bill of *Middleton*, and, I am told he is a whig. I said harder things in the discussion of that bill, than I did when the Forrest bill was before us ; so in the bill of *Wetherill*. I opposed the bill of Forrest, because I thought neither the Legislature nor the courts of this State had jurisdiction in the premises, and because I did not believe he sustained the charge of adultery. I endeavored to satisfy the senate from our *constitution* and by *authority*, that we had not 2539 jurisdiction ; that to pass his bill would be to stultify ourselves ; I opposed it, to protect the honor of the State, and the legal reputation of the senate. In doing

this, I lost sight of Forrest. I was not his personal enemy, for I never knew him or saw him, save on the stage, until last winter. I did not know to what political party he belonged until late in the session. I had endeavored to define my position, on divorces, long before I knew how rabid a loco he was. But the votes in the senate and house will show, that the senate and house did not vote by party on these questions. Mr. Forrest making this charge against me may show that he hoped for success from party in his application last
 2540 session ; his defeat demonstrates that we were not so corrupt as he hoped to find us.

He states most rashly that the bill was defeated but once in the senate. If you can procure the journals of the senate and house, the journals of the senate will prove that he is mistaken.

At page 660 of senate, you will see a motion was
 2541 made to amend the bill by striking out all divorce of Forrest, and giving the Common Pleas of Philadelphia city and county jurisdiction. This was carried, 21 to 11. The bill, thus amended, was committed to the judiciary committee, and reported by the committee again with an amendment.

Upon the vote in the senate, at page 625, this bill was rejected by a tie vote, 16 to 16 ; at page 676 a motion was made to reconsider the vote, which, at page 696, was taken and carried, 17 to 16.

So you see the vote defeating his bill was once recon-
 2542 sidered. Upon the bill thus again, by the vote to reconsider before the senate, the final vote at page 691 was taken, and the bill again rejected by 16 to 17.

Thus, you see, that the bill was therefore twice rejected in the senate. But this is not all. A bill had been introduced into the house, which finally passed that body and was sent to the senate. At page 901 of the senate, you will see that this bill was also defeated, 15 to 18. The vote was upon the 16th of April, and

we did not adjourn until the 15th of May. Thus, you see, the bill was three times defeated in the senate. First, the bill originated in the senate, and then the bill of the house. Distinct bills, and at different times. 2543

Mr. Forrest is then incorrect when he swears that his bill was only rejected once in the senate. It was rejected as often as it came to a vote. He is also incorrect when he says that his bill was only finally lost because there was no opportunity afforded to reconsider or move a reconsideration. This is not sustained by the fact, for you see it was once reconsidered—the senate bill—and it could not be reconsidered again.

The house bill was defeated the 16th of March, and we adjourned the 15th of May; and yet no opportunity to move a reconsideration, when that can be done any 2544 day. The truth is, no one of the 17 who voted on the majority would move a reconsideration; and every effort was made by Forrest, but without success. He is false to truth, when he says that no time was allowed to reconsider. He had time, but no senator would move a reconsideration.

Mr. Forrest also states that in the discussion, I admitted that I was in correspondence with Mr. N. P. Willis; and was charged with acting the attorney instead of the 2545 legislator. I did state that I had written to Mr. Willis, and I had stated why; I saw his name connected with the matter in the New York papers; I think excusing the visits of his brother to the house of Mr. Forrest, and knowing no one in the city in any way connected with the matter, I had written him. Mr. Willis is at liberty to show you the letter or letters, if I wrote more than one addressed to him. Mr. Willis gave me the name of Mr. Charles O'Connor, and with him I corresponded after this. Mr. O'Connor may show you the letters written to him; there is nothing improper in any 2546 of the letters, so far as I know; the imputation that I was charged as acting the attorney of Mrs. Forrest in

the senate, and made no reply, is nothing more nor less than a *falsehood*. There was no such charge made that I heard, and more than that, *no Senator dare make it*. I did oppose his bill—and with some energy, and I had good men with me—men beyond suspicion—above reproach. I have written more than I intended when I sat down, for which excuse me.

One thing is strange, in the whole matter, why my
 2547 name should be introduced into this paper by Mr. Forrest. Suppose I were all he says, can that aid him now? It might at Harrisburg, but certainly not in New York city. If Mr. Forrest wishes thus to vent his mortification at defeat last session, he is welcome to indulge himself; still I cannot help believing that he would have acted more like a gentleman, had he omitted all these unnecessary things.

The record shows how I acted and how I voted, and they show how Mr. Forrest *persisted* in his application for divorce. I wish, for the sake of Mrs. Forrest, that they showed *all* the efforts made by Mr. Forrest to meet with success.

Yours,

JOHN H. WALKER.

B

RADNOR, Del. Co., Dec. 6th, 1850.

Gentlemen :

Mr. Reed has informed me, that on or about the 16th ult., a letter to me was forwarded by you, making
 2548 some inquiries of me in relation to the Forrest divorce case, as it was presented to our Legislature last winter. I have not received the letter, and therefore cannot precisely answer any inquiries upon the subject. But I have seen a copy of the New York Herald, of the 29th of Novr., in which my name, as that of a senator, is most offensively introduced. I pronounce all the insinuations and intimations, and accusations of that publication, so far as I am concerned, to be utterly false and calumnious.

I opposed the bill to divorce Mrs. Forrest, because I thought, and still think it very wrong, and in violation of every rule of right and decency. I opposed it actively and earnestly, with no personal acquaintance whatever with Mrs. Forrest, and no correspondence whatever with her or her counsel. 2549

I saw, or thought I saw, very dangerous influences at work in favor of the bill, and used my best and most disinterested exertions to counteract them, and protect the rights of an absent and relatively friendless woman. I have no reason to think I was wrong.

Very respectfully,

H. JONES BROOKE.

Messrs. HOWLAND & CHASE.

SUPREME COURT.

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|-----------------------|
| CATHARINE N. FORREST, |
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| <i>agst.</i> |
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| EDWIN FORREST. |
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City and County of New York, ss.

Richard S. Willis, of the said city, composer of music, being sworn, says as follows: I never was concealed in the house No. 284 Twenty-second street, or anywhere else, for three days and nights, or for any time whatever; I never entered the house of Mr. Forrest, except openly, through the front hall door, or left it in any other manner; I never practised or knew of 2550 any concealment therein; I never was guilty of any impropriety towards Mrs. Forrest; anything which may have been said or sworn to the contrary of the preceding statement, and which in anywise refers to or reflects upon me, is wholly untrue; as far as I know,

or have any reason to believe, Mrs. Forrest is a perfectly chaste and virtuous lady.

RICHARD S. WILLIS.

Sworn to, before me, }
Dec. 14, 1850, }

W. S. BREWSTER,
Com'r of Deeds.

SUPREME COURT.

CATHARINE N. FORREST,

against

EDWIN FORREST.

City and County of New York, ss.

John B. Rich, of the city of New York, being duly sworn, deposes and says as follows :

I am proprietor of Rich's Institution for physical training, but by profession a dentist, and have practised as such in the city of New York, for the past ten years. I am also the father of a family. In November of 1849,
2551 Mrs. Forrest was confined to her room, with congestion of the lungs, and also by neuralgia of the face, which was superinduced by a decayed tooth. I had been, for some time previous to this illness of Mrs. Forrest's, her dental adviser, and she sent for me several times in the evening, hoping that I might be able to afford her relief in her paroxysms of excruciating pain. As the classes at my school detained me in the evening until after nine, I was never able to reach Mrs. Forrest's until near, or perhaps past ten o'clock. I have visited Mrs. Forrest in her bed-room, professionally, but never otherwise, and
2552 never without some one of her female friends or relatives being present ; and no one better than Mrs. Underwood,

if her cue was to tell the truth, and the whole truth, could corroborate the latter part of my statement. I published this statement in the New York Herald, last spring. I have never committed any impropriety with Mrs. Forrest, and as far as I know or believe, she is a chaste and modest lady.

13th December, 1850.

JNO. B. RICH.

Sworn before me, December }
14th, 1850, }

2553

HENRY C. BANKS,
Comr. of Deeds,
4 New City Hall.

SUPREME COURT.

CATHARINE N. FORREST,

against

EDWIN FORREST.

City and County of New York, ss.

William C. Bryant, being sworn, says as follows:

In January or February last, after I was informed Mr. Sedgwick and Mr. O'Connor had been consulted in relation to this controversy, Mr. Sedgwick, acting on behalf of Mr. Forrest, spoke of an annuity to be settled by Mr. 2554 Forrest.

I spoke to Mrs. Forrest, by desire of Mr. Sedgwick, and obtained her consent to the sufficiency of such annuity, in case the mode of obtaining the divorce desired by Mr. Forrest could be made satisfactory to her. After several conversations with Mr. Sedgwick on the subject, being, as I supposed, fully in possession of the terms on which he desired to arrange the matter between the parties, I reduced them to writing. A member of my

2555 family copied them, and that copy was handed to Mrs. Forrest.

Such proposition was in the following words :

" The proposed agreement :

" FIRST.—That the agreement between the parties, which Mr. O'Connor had seen, be executed. James Lawson is the trustee, but any respectable and proper person may be substituted.

2556 " SECONDLY.—That this agreement be left with Wm. C. Bryant as an escrow, to be delivered to Mrs. Forrest, in case of a divorce obtained from the Pennsylvania Legislature, otherwise to be handed back to Mr. Forrest's counsel.

" THIRDLY.—Mrs. Forrest is expected to promise some mutual friend, who will give assurances in her behalf, that she will not interfere to prevent the obtaining the divorce from the Pennsylvania Legislature.

2557 " FOURTHLY.—That Mr. Forrest will pledge himself to some mutual friend, that he will not give any publicity to the charges or testimony adduced on the application, and will prevent any publicity being given them by others now or hereafter. He engages, also, that the application shall be couched in the most delicate and general terms possible, and contain no charges which may be unnecessary to the object of obtaining a divorce.

Mr. Sedgwick will, at any time that may be desired, communicate with Mr. O'Connor in relation to this matter."

And further this deponent saith not.

WM. C. BRYANT.

Sworn to, this 18th day of December, }
1850, before me, }

C. B. WHEELER,
Commissioner of Deeds.

CATHARINE FORREST,

against

EDWIN FORREST.

City and County of New York, ss.

Catharine N. Forrest, the plaintiff in this action, being duly sworn, deposes as follows, that is to say :

I have not, in this action, charged Mr. Forrest with infidelity, and was advised that it would be irrelevant to the present case to make such charge or refer to such offence by him. But, as he, or his counsel thinks otherwise, it may be proper for me to state the facts. The annexed schedule, marked "Copy charge and answer," (see it at page 809) contains the charge on that subject, 2559 made by me in another action (omitting the numbers of houses and names of female participators,) and also contains Mr. Forrest's answer in that action. I am advised and believe that such answer is a virtual admission of the infidelity charged. He denies the fact, at the particular times and places charged, but has not ventured to deny the fact itself. I may have been misinformed as to those particulars, but the principal fact remains undenied by him. My affidavit made in this action, on the second day of September last (1850), was prepared by one of my counsel, under my instructions. I was 2560 present at his office during nearly all the time he was writing it, and I prepared three copies of it with my own hands, at my residence, before deposing to it. I was under no earthly influence in the preparing or the signing of said affidavit, save my own judgment and reason ; though, of course, from time to time, I received the advice of counsel, and I now re-affirm the truth of said affidavit, in all respects. I deferred this action against Mr. Forrest to the latest practicable moment, and there-

2561 by afforded him time and opportunity to recede from his pursuit of extreme measures against me. Both in my protest to the legislature of Pennsylvania and my said former affidavit, I studiously avoided reference to irrelevant topics and censures upon third persons; I also abstained from any imputation against Mr. Forrest, except to the extent which was absolutely necessary to the maintenance of my action, and seemed necessary to the vindication of my own innocence. I annex a copy of my said protest, and now confidently refer to the same, and to my former affidavit, to show that I have

2562 hitherto abstained from stating any fact, not absolutely necessary to the case, which was discreditable to Mr. Forrest, or to any one else. The protest is dated March the fourth, 1850, and contains not a word against him, except what may be implied from the circumstances adduced to show my innocence. My affidavit, which is dated September 2d, 1850, indeed, asserts, that he knew his suit to be unjust, and, in connection therewith, shows that he practised an artifice (which he has not ventured to deny) in order to entrap me into an implied admission of guilt. In impugning the motive of

2563 his proceedings against me, and denying his belief in the imputation of crime, I conceived myself to be fully justified, as well by the necessity of the case as by truth; for if he believed me to be guilty, such belief, coming from one who knows my character so well, would afford some presumption against me. It, therefore, seemed to me proper to deny that Mr. Forrest believed me to be guilty, as I had satisfactory evidence that he did not. I was emboldened to do so by conscious innocence, by faith in Divine protection, and reliance upon the justice of my country, and have not yet felt the desire or expectation of an acquittal from the

2564 charges of impurity brought against me, unless I shall be able to convince the court and jury, as perfectly, that those charges are preferred in ill-faith as that they

are unfounded in fact. My defence must, in future, take a firmer tone. When I perused Mr. Forrest's affidavit, evidently framed by himself for publication, imputing to me every grossness and criminality that fancy could suggest, and involving my aged father, my sisters, all that are near and dear to me, I became convinced that further forbearance was not my duty, and that thenceforward, as far as truth would warrant, honor and duty required me to repel all Mr. Forrest's imputations, to present his proceedings against me in their true colors, and to deny his self-praise, whenever it was unfounded in fact, and reflected, even indirectly, upon me or mine. True it is, I am a woman and a wife, and it may be thought that I defend too firmly. True it is, that Mr. Forrest is yet my husband, and submission to him may be thought obligatory upon me ; but none can deny that in him I must also now recognize a bitter and relentless enemy ; one who took me from my father's hearth, promising to cherish and protect me, and now, after wearing out in his service all the bright years of my youth, seeks to cast me forth, covered with infamy, and to ensure my utter destruction is persecuting all, even of my nearest kindred, who venture to afford me the slightest countenance. 2565

In reference to what happened after his alleged discovery of my unworthiness, he quoted me as saying that he treated me " with compassionate kindness." He also asserts that he treated me " with the consideration and gentleness due to a woman ;" that he is of an unsuspecting disposition ; that he had " always, in his relations with me, been affectionate and happy ;" that he has " fully complied with his obligations ; been, until the separation, my constant and affectionate companion ; uniformly attentive, tender and indulgent ; that we lived harmoniously, in a spirit of kindness and confidence, until such discovery ; and that his conduct has been generous and kindly." My affidavit contains no 2567

such idea as that quoted, nor did I ever say anything of the kind ; and the rest of Mr. Forrest's assertions, above referred to, are essentially untrue in all respects. They are most deeply so, in respect to every period since about the month of August, in the year one thousand eight hundred and forty-six, more than two years before
 2568 he found the Consuelo letter. He speaks of a habit of writing "from her lover and husband, Edwin Forrest." Twice, and *twice only*, did he ever so write, to my knowledge. The extravagant character and manner of Mr. Forrest's charges against me, lead many to suppose that he is insane ; and others, perhaps, believe, that he is the victim of misrepresentation. I think I know that he is not insane, and I have good reason to be confident that he is not in the least misled. I am quite sure that he is himself the immediate originator and instigator of
 2569 all the charges he advances, and that the agency of others is in mere obedience to his will. My conception of the issue between myself and him, will be seen from this : and I trust the court, in view of the wide detail of gross and evil imputations in his affidavit, will excuse me for fully entering upon its refutation. I deeply lament that the practice of the courts permits Mr. Forrest, by his affidavit, to draw into review, in this case, his controversy with Mr. Macready, and our private intercourse in relation thereto. More deeply still do I lament, that in his rage against me, he should be privi-
 2570 leged to publish his rude invectives against my sister, for having affectionately stood by me, throughout my trials.

Mr. Forrest never found me standing between the knees of Mr. Jamison, or with his hands upon my person, or in any immodest position whatever, nor did he ever ask what any such transaction meant, nor did I, on any such occasion, change my position or reply with perturbation, or otherwise, that Mr. Jamison had been examining my phrenological developments. I neither

know nor believe, that Mr. Jamison, on the occasion referred to by Mr. Forrest, or on any other, precipitately withdrew, or that he was then, or at any other time, 2571 diligently searched for, or that on any such occasion, he was a party to any engagement to make a visit, or had been invited or expected to accompany Mr. Forrest or myself to any place. I never wrote to Mr. Jamison, after Mr. Forrest found the Consuelo letter. Mr. Forrest never said a word to me at any time in his life, about the peculiar position, or any position, in which he had found me, or in which I had been with Mr. Jamison, at Cincinnati, or anywhere else. Mr. Forrest never asked me if I had written to Mr. Jamison, nor did I ever call God to witness, or say that I had not so written. 2572

All that is said by Mr. Forrest in his affidavit, and herein above denied, concerning Mr. Jamison's acts or mine, in reference to said Jamison, at Cincinnati, or anywhere else, is absolutely untrue in every respect; and my first knowledge of any such facts existing, even in imagination, was obtained from Mr. Forrest's pretended evidence before the Pennsylvania Legislature, subsequently to the first of February last (1850). I never knew, nor prior to the present year, did I ever hear of any alleged "treachery or profligacy" of said Jamison, or that his character for veracity was bad, or that he was deficient in principles 2573 or honor, in regard to women, or that he ever was guilty of any misconduct with Mrs. Hunt, or towards her husband, (except as hereinafter stated;) nor do I admit my belief of any of the charges against him, by Mr. Forrest. I know from common report, that Mr. and Mrs. Hunt separated, that the lady obtained a divorce from her husband, and afterwards married a Mr. Mossop, and by the latter name has been engaged in leading parts, and respectable theatres. After the separation of Mr. and Mrs. Hunt, Mr. Forrest was on terms of the utmost

2574 apparent cordiality with Mr. Jamison, and frequently invited him to our house; and during this very state of things, as he himself stated to me, visited Mrs. Hunt in New Orleans. And on the last day that we were in Cincinnati, Mr. Forrest asked Mr. Jamison to dine with us, which invitation was declined. Mr. Jamison saw us off in the cars. I have a recollection that at some period, and I think whilst we were in Europe, there was some publication in the papers relative to Mrs. Hunt and Mr. Jamison; but precisely what it was, I do not recollect. Mr. Forrest at the time spoke very highly
 2575 of Mrs. Hunt. The allegation that I received visits or attentions from Mr. Jamison, after the Consuelo letter, has this much truth in it: Mr. Forrest and myself returned to Cincinnati, where we remained for three days, at the same hotel in which Mr. Jamison also boarded. He conducted himself with ordinary courtesy to me, when we met during these three days. Mr. Jamison promised, in the presence of Mr. Forrest, at Cincinnati, to bring me, when he next came to New York, some music which I had, from haste and inadvertence, omitted to pack up. In August he called upon me, at the house in Twenty-second street, deliver-
 2576 ed me the music, and spent some half hour paying an ordinary morning visit. It was one o'clock in the day, and I received him with what he seems to have considered coolness. I had once expressed a sufficient censure of the Consuelo letter, and I did not intend in any form, favorably or unfavorably, to notice it further, I therefore cannot say that I intended to exhibit any feeling in my manner, on that occasion.

Mr. Jamison never called upon me, after our final departure from Cincinnati, except this once. Further
 2577 than this, it is not true that I ever received any visits or attentions of said Jamison, after the receipt of said Consuelo letter.

The first conversation between Mr. Forrest and my-

self, about the Consuelo letter, was later than January 20th, 1849. The conversation between Mr. Forrest and myself, about that letter, was as stated in my said former affidavit, and none of the additional matters, stated in Mr. Forrest's affidavit, took place; he did not, in speaking of such letter, refer to the subject of virtue; he did not say that said letter involved my character fatally, or, at all; he did not charge me with retaining 2578 it secretly, except by asking me why I did not show it to him; he did not say that a really virtuous woman would have spurned it, or torn it into pieces, or "flung them into her insulter's face," or "never seen him afterwards;" I never verbally, or otherwise, "admitted an imprudence in receiving or concealing such letter."

I did not then, or ever before December 24th, 1849, protest that I was not guilty of crime; I never said that I was afraid, in reference to such letter; I never exclaimed, "Oh God, why did I not destroy it," or said anything of the kind; nor did Mr. Forrest ever 2579 remark, "that it was reserved by heaven as the instrument of my exposure." I declare that each and every of the allegations of Mr. Forrest in his said affidavit, touching his conversation or conversations with me, and herein above denied, is wholly, and in every respect, untrue.

During the interval between Mr. Forrest's first announcement of his intention to separate from me, and the actual separation, I spoke with him about the event, and its painful consequences to me. I said that but one cause could justify him in it, that was a departure from 2580 virtue by me. I said that the public would assume that cause to exist, and condemn me accordingly. Mr. Forrest replied that there was an eminent example to the contrary, that a distinguished citizen, high in office, whom he named, had separated from his wife, and had never tolerated inquiry as to its cause, and he desired me, if any one ever dared to insult me, or question my purity

on account of the separation, to call upon him, and he would defend and right me. The apparent kindness of this offer led to a somewhat free, but, on my part, a very sad conversation between us, as to my future course of

2581 life. Mr. Forrest said that, perhaps, my vanity would lead me to go upon the stage, I answered that perhaps it might. He rejoined, substantially, then I was lost, that I would descend, step by step, from bad to worse, and would, at length, become criminal. I replied that there was nothing in my past life to warrant his saying so, and whatever evil might thereafter befall me, I wished to give him, at that present time, whilst I yet had his full confidence, for his satisfaction in such evil hour—should it ever come—the strongest proof in my power, that whilst living with him, I had never deviated

2582 from rectitude. Accordingly, I requested him to write for me the most solemn paper to that effect, which he could devise, and offered to pledge myself to its truth. Mr. Forrest, at once, scouted at this idea, and declared that he never would have lived with me an instant, after entertaining the slightest suspicion of me. But, on being pressed, he wrote a paper, which I signed. I read that paper but once, and then, rather rapidly. I have no copy of it, nor any precise recollection of its contents. I intended it to be as strongly worded as possible, yet my impression, and best present recollec-

2583 tion and belief are, that its language only refers to, and denies levity, or mere venial breaches of decorum, and that it does not contain any denial of criminal conduct. I am confirmed in this belief, by the fact, that Mr. Forrest has made allusions to this paper, with a view to my prejudice, twice since the commencement of this action, and has, on both occasions, withheld any copy thereof, or any precise statement of its contents. The signing of that paper did not attract much attention from me, being only connected, in my views, with a future evil event, suggested by Mr. Forrest, but deemed impossible

by me, and I cannot remember recurring to it, even in 2584
 thought, from the time of signing it, until I saw a re-
 ference to it in an answer of Mr. Forrest to my action
 in October last (1850). Mr. Forrest wrote said paper,
 and my mode of signing makes it easy to write above
 my signature. From the statements in his affidavit, I
 suspect that he has ante-dated it. I deny, absolutely,
 that Mr. Forrest ever proposed to me to take an oath
 attesting my innocence; on the contrary, it was my pro-
 posal to him, as above explained; and I declare that
 his statements in his said affidavit about my having 2585
 sneered on the occasion of taking any oath, or signing
 any writing, and his statements about the conversation
 alleged in his said affidavit, to have taken place on the
 occasion of my signing such paper, are wholly untrue.
 No such transaction ever occurred; never before De-
 cember 24th, 1849, did he charge me with swearing or
 speaking falsely, or with falsehood at all, with derision,
 or scornfulness, recklessness, or a mocking manner. He
 never told me in his life, that "I should not want
 whilst I conducted myself properly," nor that "he was
 not disposed to deal with me harshly," nor did I ever
 say to Mr. Forrest "what is to become of me." I 2586
 never entreated or requested Mr. Forrest to spare, or
 endeavor to spare me, so far as he could, or at all, the
 shame or disgrace of any exposure of any circumstance
 whatever, or to remain silent about, or to conceal, or not
 to mention the intended separation, or any alleged cause
 thereof, or to defer such separation until the latter part
 of the month of April, 1849, or to any time when he
 might do so without inviting special comment, or re-
 mark; and I never did, in any way, suggest, advise, or
 request a postponement of such separation, or seek to
 defer the same, except as hereinafter stated. The time 2587
 of separation was appointed and fixed upon by Mr.
 Forrest, and, because I had no power to prevent
 it, submitted to by me; first, for the first day of

March ; again, for the third Monday of March ; again for the first day of April ; again, for the twenty-third day of April ; and one or two other like appointments were made by him for that purpose, which I am unable precisely to remember. Each of those appointments was rescinded by Mr. Forrest, of his own motion, and for his own accommodation.

- 2588 At a time when the day of separation, for the time being, stood fixed for the twenty-third of April, Mr. Forrest being, as he informed me, under an engagement to perform at the Broadway theatre, New York, for some weeks, commencing upon the last named day, I suggested to him that if a separation should then take place, it would probably be imputed to his controversy with Mr. Macready ; and advised him to permit me to remain with him until the close of such engagement ; to which he immediately returned his dissent, and stated that the said separation should commence when our then present residence was broken
- 2589 up. This amounted to a new appointment of the twenty-eighth or twenty-ninth day of April as the day for such separation. Never, before our actual separation, did I request that any provision should be made for me, although it is true that, when the separation was alluded to, Mr. Forrest said, casually, " Of course, I will provide for you "—to which I made no reply ; and this was all that ever passed between us on that subject before the separation. When, as just mentioned, I suggested the view which the public might take of the separation, Mr. Forrest repelled the idea with utter scorn. He spoke in this way, as nearly as I
- 2590 can recollect his words : " Pshaw ! who knows or cares for you ; whether you live with me, or away from me, or where you live ? " To this contemptuous view of my insignificance I made no reply.

Mr. Forrest never told me that any calamity, connected with me, or resulting from my conduct, was

what he might have expected, or that my father had told him to beware of me, or warned him that my character and education were such that I might deceive him; nor did he ever tell me that my father said any of those things; nor did I ever give such answer concerning the same as is alleged in his affidavit, or any answer whatever. The whole statement on this subject in Mr. Forrest's said affidavit, and every part of it, is absolutely untrue. 2591

I never heard of my father having said to Mr. Forrest anything against me or prejudicial to me, until my attorney, in November, 1850, furnished me a copy of Mr. Forrest's affidavit. I am certain that my father could not have made, and never did make, the remarks against me alleged by Mr. Forrest. I believe a more affectionate father does not exist, nor one more proud of his children, or more blind to their faults. He spared 2592 no means in his power to give me the best advantages, in point of education and mental culture; he placed me at school with a lady who had in charge the daughters of some of the best families in England; and all my associates were not only in a station of life far superior to my own, but of irreproachable character. My father never had occasion to, and never did, reproach me for any impropriety of conduct, and could not have supposed or said that I was capable of deceit or dishonor. My father, as well as all my friends, 2593 strongly opposed my marriage in the first instance; but he consented, when he found my heart was set upon it. I never listened to or overheard any conversation which my father had with Mr. Forrest; and there was no closet in my father's house, nor was there any piece of furniture in any room of it, wherein any person could be concealed. I am grieved that the court, on the ground of its irrelevancy, has refused me a few days' delay, to get my father's denial of this libel upon him, and upon

me. I presume it is now on board a steamer, on its way to this country.

2594 I never secreted the alleged Consuelo letter, or kept it concealed; nor did the said Edwin Forrest ever discover that it contained any avowal of any illicit or criminal intercourse. I verily believe that at the time the said Edwin Forrest first came into possession of said Consuelo letter, he was seeking for grounds upon which to frame some excuse for repudiating me; although I can scarcely believe that he had as yet conceived the design of imputing unchaste conduct.

“Consuelo,” the heroine of a modern French novel, is therein represented as a woman characterized by the highest degree of amiability, chastity and purity, that 2595 the mind could conceive or language portray. The word signifies “Consolation,” when rendered into English. No reason could exist for the adoption of that address in said letter, except some fancied resemblance between the character of the person addressed and the heroine.

The deposition of Mr. Parke Godwin, obtained by Mr. Forrest, and presented by him to the Pennsylvania Legislature, states that about January, 1849, he lent Mr. Forrest this very novel. I am quite confident that 2596 Mr. Forrest so borrowed it in order to satisfy himself as to the character of the imaginary heroine, Consuelo, and thence to determine the practicability of founding upon the letter some charge against me. The character disappointed his wishes, and for the time he abandoned that attempt. I believe the fact to be, that he first saw the Consuelo letter after the 18th of January; I believe that he borrowed the novel, Consuelo, and wrote to Mr. Jamieson about the same time; I believe he saved himself the trouble of reading the novel, by casually inquiring of Mr. Parke Godwin, during their 2597 trip to Font Hill, mentioned in my former affidavit, as to the character of Consuelo. I believe that, from Mr.

Godwin's account of the heroine, he concluded that the letter would not answer any more seriously injurious purpose, and thereupon gave way to the temptation to make it the subject of a painful evening for me. His object in borrowing "Consuelo" could only have been to revive his memory, and assure himself of the character; he had owned and read the book, or heard it read, long before. A few words with Mr. Godwin, who is a highly intellectual person, would have answered this purpose perfectly. After being thus assured on the 2598 subject, I presume Mr. Forrest cared little about Mr. Jamieson's answer, and therefore did not await it.

There are circumstances connected with Mr. Forrest's present story, conclusively establishing that the Consuelo letter had nothing to do with our separation, and that he sentenced me to that separation on the eighteenth of January, 1849, without the slightest suspicion on his part of any impurity or impropriety in my demeanor as a wife. In a word, he expressly admits that he pronounced that sentence because I uttered to him 2599 an offensive speech, and for no other cause whatever.

He declares expressly, that his confidence in my purity was perfect, until he found the letter. He admits that the immediate cause and provocation to his sentence against me, was my contradicting him on another subject. In relation to the letter which he pretends he had found, he states that, on that evening, "He questioned the hand-writing, and *hoped* that the manuscript was merely an extract from a licentious French novel. "He *determined*, therefore, to take no measures on the sub- 2600 ject, until he had fully informed himself upon these points." Again he says: "This deponent having, after some days' inquiry, ascertained that the said letter was in the hand-writing of Mr. Jamieson, and that no part of it was extracted from 'Consuelo,' was brought to the melancholy conclusion," that his wife was guilty of impurity.

Mr. Forrest could not now deny that the eighteenth of January (or perhaps more properly the 19th, as it was after midnight) was the date of my sentence; nor
 2601 could he safely assert that he had then referred to the "Consuelo" letter. The only thing he could do for the purpose of misleading those who might not closely scrutinize his story, was to assert, that he had found the letter at that time. The necessity of the case then compelled him to explain why he did not speak of it, and his explanation is, that the letter, of itself, was, in his judgment, no adequate evidence of impurity; that further inquiry was necessary, and that "hoping" there was an innocent explanation, he "determined to take
 2602 no measures upon the subject," until he could make the requisite inquiries; and yet he is forced to admit that while this *determination* existed, and this *hope* animated him, he sentenced me to the separation now existing, and avowedly at the time for a different cause. This surely is enough to establish the fact which I have asserted, that Mr. Forrest banished me from his side for no cause connected with impurity on my part, or the belief or suspicion of it by him. His own words condemn him.

The manner in which Mr. Forrest has involved himself in this admission, as well as in certain inconsistencies in this part of his affidavit, I will explain. His
 2603 proofs for the Pennsylvania Legislature—consisting chiefly, if not wholly, in the affidavits of Mrs. Underwood and Robert Garvin—showed my return from a party on the evening of Thursday, January 18th, and that a dispute was overheard between us after midnight. Mrs. Underwood testified that on the next Saturday morning, that is, January the twentieth, I missed the Consuelo letter—expressed terror and surprise—showed a consciousness of detected guilt. I presume the intention was to connect my search for the letter on Saturday
 2604 morning with the dispute of Thursday night, so as to

show that that dispute arose out of my purity being then questioned.

The statements contained in Mr. Forrest's affidavit, about my going to a drawer, starting back, uttering an exclamation, being asked a question by Mrs. Bedford (now Mrs. Underwood), making a reply thereto, expressing gladness, and wishes, about drawers and letters, and burning any letters, are, and each and every of them is, wholly untrue, in every respect. Nothing of the kind ever occurred.

When Mr. Forrest was making up his present story, 2605 he seems to have had these proofs before him. He often refers to them, and he has improved upon this story of Mrs. Underwood, concerning my acts on Saturday morning, so as to make it account for conduct on his part, which, otherwise, would appear very inconsistent.

He had to make inquiries, to ascertain the hand-writing, and to read a novel in two volumes. This, of course, took some time. He says it took some days. Yet, by Saturday evening he made his accusations, although, in respect to the hand-writing, he had written for information to Mr. Jamieson, at New Orleans, only 2606 the same morning.

The only mode to make it consistent, is to show some unexpected incident occurring on Saturday, to induce a change of purpose; and accordingly, Mrs. Underwood's observations concerning my manner and conduct on Saturday morning are here introduced. Yet, Mr. Forrest, Mrs. Underwood, and Mr. Lawson, the procurer of her testimony, all unite in saying that none of her tales reached Mr. Forrest's ears for more than one whole year after this time, that is to say, until February, 1850. 2607

It will be seen from this, that in his present statement, Mr. Forrest has greatly perverted the facts, and yet, done himself no service. Whether he found the letter on the eighteenth of January or not, the result is the same; he

did not act upon it on that day, yet ~~on~~ *that day* he decreed the separation.

It is not true that carefully, or in any way, at Cincinnati, or anywhere else, I preserved about my person a bundle of letters; nor do I believe that Mr. Forrest ever thought he had observed any such act. I never entreated or requested Mr. Forrest's silence in relation to
 2608 any act or conduct of mine, nor did he ever agree to be silent, to shield me from shame, or suffer in silence. I deny all his allegations in these respects. It never was agreed between Mr. Forrest and myself, to occupy as before, the same apartment, to avoid the suspicions or scandalous comments of servants, or to avoid any consequence, nor was anything ever said or understood between Mr. Forrest and myself on that subject. The intended separation of Mr. Forrest and myself was known to the servants from the first; one of them having
 2609 overheard the dispute on the eighteenth of January, 1849; and immediately afterwards it was talked of throughout the neighborhood. It was not until about a week after that time, that anything was said between us about our conduct in connection with such separation. Then, for the first time, Mr. Forrest stated to me that he wished the cause of our separation to be kept a secret; that he did not wish it known that any person lived after impeaching his veracity; that it was no other person's business; that it was our own affair, and we had a right to do as we pleased. I acquiesced, but did not exactly promise obedience. I remarked that I must
 2610 sary to state it to some other friends. He added, that he wished no one to know it, and I remained silent. This was before the Consuelo letter was spoken of by Mr. Forrest. After that subject was introduced, he made the same request for silence, and I presume considered me as having acquiesced, for I answered pretty much as before.

Mr. Forrest was never requested by me, after he spoke of said Consuelo letter, to enter into society with me, nor did he decline so to do. He was never in the habit of going into any society, and the only friends we saw, were those who came to our own house. Subsequently 2611 to our return from Europe, in 1846, Mr. Forrest and I accepted but four invitations to dine out together; but, on all other occasions, Mr. Forrest would urge me to go without him; sometimes I did so. The only invitation we received after January 18th, 1849, was one to sup with Mr. and Mrs. Bryant. I asked Mr. Forrest if he wished me to go; he said, "Do as you please;" but I felt too sadly, and feared that I should not be able to control my feelings during a whole evening, so I did not go. Mr. Forrest went. Mr. Forrest so uniformly refused all invitations, that our friends ceased to ask him to visit them. 2612 I did not appeal to Mr. Forrest to conduct me to Mr. Godwin's house, or in any way request him to do so. On the 27th of April, I asked Mr. Forrest to request Mr. Lawson to call on me that evening. Mr. Forrest went out, and on his return, said that Mr. Lawson would call in the evening as I desired. He asked why I wished to see Mr. Lawson. I replied, that as Mr. Lawson had been my father's friend, I considered that he would be the most proper person for me to request to call for me and conduct me to Mr. Godwin's. Mr. For- 2613 rest immediately said, "I'll take you there myself;" to which proposition I most gladly assented. Mr. Lawson, however, called, as he had been directed, and I told him why I had requested the interview, but that I of course preferred that Mr. Forrest should take me. Mr. Lawson agreed with me that this was best.

The affidavit of Mr. Jamison, to which Mr. Forrest refers, was made without any solicitation or interference on my part, and a copy of it sent, as I believe, to a New York newspaper for publication. The person to whom it was sent by Mr. Jamison handed it to my counsel;

- 2614 and I intend that it shall be presented to the court in this case. It was not prepared for, or even placed before the Pennsylvania Legislature to my knowledge or belief. Once, during the interval between the eighteenth of January, and the end of April, 1849, Mr. Forrest spoke of some person going to Kentucky or some distant State, to obtain a divorce for incompatibility of temper. I asked him if he wished a divorce, and added that if he did I would go with him, out of the State, wherever it could be obtained. He replied that he did not desire it. I presume I said this more than once. But I never made,
- 2615 through Henry Wikoff, or otherwise, directly or indirectly, any proposition, written or verbal, to leave the country, to renounce Mr. Forrest's name, or to leave my allowance to his generosity; nor did I ever propose or agree to make no opposition to any application to the Legislature of Pennsylvania, which alleged or should allege incontinence against me; nor did I ever make or authorize any proposal for any amicable or other arrangement with Mr. Forrest about a divorce, after he commenced his application to the Pennsylvania Legislature.
- 2616 It is not true that when Mr. Forrest was at home the house was closed and the family retired at 10 or 11 o'clock. Ever since our marriage, we were in the habit of keeping very late hours, as all our friends know; and this habit was continued even until the week of our separation. On the Sunday prior to the separation, some of Mr. Forrest's friends who dined with us, did not leave our house until after four o'clock the next morning. It is untrue that our house was a scene of revelry and intemperance during Mr. Forrest's absence. Mr. Forrest had always, since the time we first went to live in Twenty-second street, expressed a desire that if I wished
- 2617 to invite ladies, I should do so in his absence; and it had been my custom to do so for years, as I found it almost impossible to induce him to go into society, and his absence on professional duties was the only excuse

I could make for his refusing to visit his friends. As I generally accompanied Mr. Forrest when he left home, the opportunities which I had, for seeing the few friends who were still kind enough to continue their acquaintance with me under these circumstances, were very rare.

I never left Mr. Forrest's house or returned to it, day or night, in disguise. I never let myself in nor had a 2618 night-key with which to do it. It was late in April, 1849, that we first found the latch-key of our house. It was never used nor needed. The imputation in Mr. Forrest's affidavit, that I ever visited a house of ill-fame, is shamefully untrue. I have not declared, when bills were presented to me, that I did not care, and that whatever the amount, Mr. Forrest must pay them. I have had occasion to defer a payment, and have said that in case of accident to me, Mr. Forrest would be liable. I have not incurred any extravagant or unnecessary bills, since the separation; and the payment of any bills of 2619 mine has been requested of Mr. Forrest, I am quite sure he has not complied with the request.

There is not the slightest truth in the charge of intemperance made against me by Mr. Forrest, in his said affidavit; I never was intoxicated, in any degree, in my life; I never heard of such a charge, from any quarter, until Mr. Forrest's affidavits, printed in February or March, 1850.

It is true that Captain Calcraft, an old friend of my father, visited me and my sister occasionally; that he 2620 once dined with us, and once helped to carry a tray, as mentioned in his affidavit; it is true that Mr. Samuel Marsden Raymond spent one night at our house; it is true that Mr. Richard Willis, his sister-in-law, Mrs. N. P. Willis, Mrs. Voorhees, and myself, on one occasion, under circumstances perfectly justifying the act, did stay up a whole night until daylight. It is true, that Mr. and Mrs. N. P. Willis, together and alone,

have visited me ; it may be, that on some occasion Mr. Henry Wikoff came home with me in a carriage on an evening. Dr. Rich, on some few occasions, I am not sure
 2621 of more than twice, visited me, professionally, in my sick chamber, after ten o'clock at night, during a period of six weeks that I was confined with a severe attack of inflammation of the lungs.

Professor Hackley, during my said illness, brought my sister Margaret home from a party at his own house, at about eleven o'clock at night, in winter ; Mrs. Hackley, as I am informed and believe, had desired Mr. Hackley to enquire how I was ; there was no fire except in my sick chamber, and, for the purpose of introducing him to a warm room, and facilitating the polite message
 2622 or enquiry of Mrs. Hackley, he was asked into my chamber,—where, in presence of my sister, he remained a few minutes. Mr. Hackley did pass through the basement, as hereinafter explained.

And with these exceptions, I aver that none of the facts stated in Mr. Forrest's affidavit on information derived from Mrs. Underwood and Robert Garvin, or from the affidavits or depositions of either of those persons, or as appearing in their testimony or evidence, or stated in Mr. Forrest's affidavit to have been known, seen, or heard, by either of those two persons, or as having at-
 2623 tracted the attention, or excited the suspicions of domestics—ever occurred or happened. To the best of my knowledge and belief, none of the matters alleged by Mr. Forrest, upon information from the persons named, Underwood and Garvin, or as having been testified to or known by them, or either of them, have ever been sworn to, by them, or either of them, in such a manner as to render them responsible to the laws of this, or any other State : whenever they venture so to testify, I can effectually contradict and impeach them, as I am well assured. When I first came to my house, in Sixteenth
 2624 street, it was in a very unfinished state, and a whole

month elapsed before we used any door for entrance or exit but the basement. We used the basement room also for our meals, and, indeed, for all purposes during the day, because the parlors were unfinished. Dr. Hackley called once or twice during this period, and one evening he came just as we were going to tea; he joined us, and shortly after, Mr. Stevens called, and rang the bell (which had only that day been put up). The servant, as I am informed and believe, on admitting him, asked him to come down to tea, but he declined and 2625 went into the parlor, which was not completely furnished. When we had finished tea, Dr. Hackley said, "I have an engagement, so I will not go up stairs, or I shall stay too long," and he left by the same door which he had entered, and which we had all been in the habit of using until that day. I believe Mr. Stevens was the first person who had been admitted by the hall door.

Andrew Stevens, named in the affidavit of Mr. Forrest, is the same person who aided Mr. Forrest in the transaction of his letter to me in December, 1849; he has been Mr. Forrest's instrument throughout this affair, 2626 has reviled myself and my sister shamefully in the newspapers; and, as I am advised and verily believe, he can be effectually impeached whenever he shall appear in a court of justice, and depose to any of the matters which Mr. Forrest asserts on his authority. There is not any truth whatever in the statements alleged in Mr. Forrest's affidavit to have been made by him, said Stevens.

I did not intend by anything in my former affidavit to convey the idea that after the 18th of January, 1849, Mr. Forrest gave me any reason to believe that he would relent, or that his affections had returned to me. He 2627 manifested, in the presence of others, kindness, and external respect generally; he sometimes seemed kind, for a brief space, when we were alone. But I felt all along that a separation must take place, accompanied by a faint hope that it might not endure forever. His man-

ner was not that of an honorable man to a guilty wife ; he made me in every way subservient to his pleasure and convenience. In relation to the testimony of the Reverend E. L. Magoon, spoken of in Mr. Forrest's affidavit, the facts are as follows: I was on terms of
 2628 the greatest friendship with him ; I conceived him to be an honorable gentleman, and a true, pure-minded Christian. His letters, in my possession, and ready to be produced, manifest a regard for me of the kindest description. If the Consuelo letter had not been found, these are so kindly, affectionate, and familiar, they would have answered Mr. Forrest's purpose about as well, though they are certainly pure and innocent. I remember saying to Mr. Magoon that Mr. Forrest was variable in his demeanor towards me ; that sometimes he was morose, sometimes he was affectionate, and frequently treated me more like a sister than a wife. I understand
 2629 he has testified to my having told him " that for several months previous to her late separation, she and her husband had known each other only as brother and sister." I have no doubt my figurative use of the word sister was misunderstood by him. I presume that he really thinks that I made him the very immodest and unbecoming communication which he has reported. I did not make it. I did not suppose Mr. Magoon believed me capable of making it. No one could have persuaded me that he was capable of so construing any words of mine. Mr. Magoon has never sworn to this, as I am
 2630 informed and believe, in any due manner, so as to make it evidence.

My letter of December 29th, 1849, was not written by, or under, or in consequence of advice, counsel, or urgency from any one. I wrote it on my own motion, though I did show it to Mr. Godwin before transmitting it. I never assured Mr. Forrest, or admitted to him, or to any one else, that the sum allowed me was sufficient.

I did not leave Mr. Forrest, or his residence, voluntarily, or consent to a separation; I did not resist—men at the place of execution never resist, yet I suppose they are not willing to die; I was quiescent, as they usually are, and consented no more than they do. There never was any understanding that Mr. Forrest was to pay my board. Mr. Forrest, at our meeting in the street, did not speak, nor did I reply to him, as in his affidavit is stated, except that he did revile my sister, as he alleges.

Mr. Lawson once said to me that Mr. Forrest could not dispose of real estate without my signature to the deed of conveyance; he said, "I suppose you would not refuse this?" To which I replied, "Of course not." Mr. Stevens told me, a few days after this, that Mr. Forrest intended to request Mr. Sedgwick to draw up a deed of settlement, so, that if I were in Europe, I could rely upon having my allowance regularly. Mr. Stevens told me, on the evening on which he brought me Mr. Forrest's letter of December 24th, 1849, that Mr. Forrest had seen Mr. Sedgwick and had ascertained from him that I could not by any deed legally sign away my right of dower, and that the only way Mr. Forrest could settle the matter, and obtain full right over his own property, was by obtaining a divorce. I did not make any offer, nor did Mr. Forrest make any declination on this subject, except as I have above stated. It is true that Mr. Forrest offered me one of three houses in 22d street (which rented at that time for three hundred and seventy-five dollars each a year) and five hundred dollars a year to live upon; of course I declined the offer.

My present course of life is not prodigal, nor reckless, nor do I give expensive entertainments to any persons, or receive or entertain any person or persons of loose or degraded character, as Mr. Forrest untruly alleges.

We have little time to receive visitors during the day,

2634 but we are always at home to any friends who may call in the evening. As we dine early, and, as during all my life I have taken supper, we have that meal every night at ten o'clock ; and if there happen to be any visitors with us, they are usually asked to join us. Twice only, since we have had the house in Sixteenth street, have we invited any number of persons in an evening, and then they came sociably. I never pretended to give parties.

As to entertaining or receiving women whom Mr. Forrest charges with being unworthy, and gentlemen
 2635 against whom he alleges criminality, it is impossible for me to avoid doing so, unless I would exclude myself from all society, even including my own sister. Many of Mr. Forrest's charges are doubtless made for this express purpose, and I consider it my right, as it is really necessary to my safety, to resist this attempt to exclude me from society. Mr. Forrest has furnished conclusive evidence to me, that he makes charges without believing them to be true. For instance, his proofs furnished to the Legislature of Pennsylvania, in March, 1850, implicate, among many others, Mr. Henry Wikoff,
 2636 Dr. Rich, and Dr. Hackley. In his libel, presented to the Philadelphia Court, in August last, he named eight, and in his recriminatory answer to my action for a divorce, in October last, he named six participators in my alleged guilt, omitting Dr. Hackley in the first, and all these three gentlemen in the latter ; thereby showing that he did not believe the charge against them. And then on the 15th of November, 1850, he swore to his said affidavit in this action, again implicating all three of them, and accompanied it with a recriminatory answer in the same action, omitting all their names ; so
 2637 that, in this very action, and on the same day, he charged them, and gave legal notice that on the trial he would not attempt to prove them guilty. In his Philadelphia libel, from which Dr. Hackley's name is

omitted, he states that he does not know the name of any of the guilty participators not therein named ; thus expressly declaring that he did not believe the charge against him.

The charges of keeping unworthy company, and of evil habits and character, made against my sister Margaret, by Mr. Forrest, are wholly untrue. He never made such charges until the present year, to my knowledge or belief. It is also untrue that I ever made parties for the purpose of bringing Mrs. Voorhees into society. I used to meet all or nearly all the ladies of my acquaintance at her rooms in Great Jones street, where she boarded with Mrs. Ingham for two years prior to our taking the house in Sixteenth street. The character of her associations may be judged from the fact that I hold the letters of Judge Conrad and Mr. Magoon, the witnesses of Mr. Forrest, written since our separation, and speaking of her in the kindest terms. She has been a chorister in one of the Episcopal churches for seven years past. It would not become me to give a list of her respectable friends, but I may be permitted to name those I can at the moment remember of her party on the 18th January, 1849, on my return from which, I was sentenced to separation. They are—

Mr. George Hall, formerly Mayor of Brooklyn, and lady, Miss Hall, Mr. Hall.

Mr. Valentine G. Hall, Mrs. Hall, Miss Hall.

Mr. Voorhees, Mrs. Voorhees, the Misses Voorhees.

Mr. and Mrs. Wm. C. Bryant.

Mr. and Mrs. Parke Godwin.

The Rev. Mr. Bellows, Mrs. Bellows.

The Rev. S. Parker.

Mrs. C. M. Kirkland, Miss Kirkland.

Mr. and Mrs. N. P. Willis.

Miss Anne C. Lynch.

Mr. and Mrs. Henry Swift, of Brooklyn.

Mr. and Mrs. Robert Watson, Miss Kate Sedgwick.

Mrs. Captain Britton, Miss Britton.

2641 Mr. and Mrs. Thomas Ingham.

Mr. Charles Ingham, the Misses Ingham.

Monsieur and Madame Troy.

Mr. and Mrs. Lehman, Madame Oppenheim.

The Rev. J. T. Headley, Mr. Tweedie.

I have already stated that Mr. Forrest's friend, Mr. James Lawson, and his lady were there, also.

Mr. Forrest states that, on the evening of my return from this party, he spoke "of the dangerous character and associations" of my sister, and that in the course of
 2642 a heated argument he so characterized them, and imputes my offensive response to these remarks on his part. The fact is otherwise. Immediately on my return, he inquired who had been at the party. I told him, and he seemed quite satisfied. He could not have been otherwise. It is true, he asked if Mr. Stevens was there. I said "No;" and to this he made no response. He then began complaining that I was more attached to my sister than to him. He said nothing against her purity or morals, but charged her in strong and harsh terms with influencing and prejudicing me against him,
 2643 and being opposed to him. This was the whole tenor of his remarks, but the manner and terms used were severe. The letters which Mr. Forrest found, from my sister to me, he saw and examined without telling me he had done so. I knew he had from extracts which I saw he had made from them, and which were in his portfolio. I said he was most welcome to see them, and he then read them with me, and seemed quite satisfied with my explanation of the several parts of them. Prior to the autumn of 1849, Mr. Forrest never forbade my sister to enter his house, or forbade me her society, or objected to my association with her as demoralizing,
 2644 discreditable, or improper in any way. He had, indeed, previously to that time, and beginning about November, 1848, shown ill-will to her, and in January, 1849,

charged her with influencing me to differ with him in opinion.

Mr. Forrest's affidavit contains very harsh language against persons who were his own intimates, and introduced to me by him. I am not bound to defend them. Mr. Wikoff, who is now in Europe, was his groomsman at our marriage; I have already stated that he was on very intimate terms with Mr. Jamison. Mr. N. P. Willis was introduced to my acquaintance by Mr. Forrest in 1838, and the acquaintance continued thenceforward. Mr. and Mrs. Willis 2645 dined with Mr. Forrest and myself at our house, in 1847. Mr. Forrest, Mr. Willis, and myself visited Font Hill together in 1848; and the most friendly relations appeared always to subsist between Mr. Forrest and Mr. Willis. I never heard a murmur against Mr. Willis from Mr. Forrest until the summer of 1849, after our separation, when Mr. Forrest expressed to me his dissatisfaction with some article published by Mr. Willis in his paper about the Astor Place riots, and about Mr. Forrest's dispute with Mr. Macready. I do not feel bound to enter into the controversy between 2646 Mr. Forrest and Mr. Willis, except where it directly touches myself. I never heard that Mr. Forrest suspected or charged any impropriety between Mr. Willis and myself until February, 1850.

In the fall of the year 1848, Mr. Forrest wrote me from Philadelphia to open his writing desk and get therefrom a letter, received by him from Mrs. Macready, whilst he and Mr. Macready were friends. He informed me that the key of the desk was in his library drawer, "which," said he, "you can open with one of the numberless stray keys about the house." I tried to do so, 2647 beginning with the key of my own bureau, which, though it went into the lock, would not turn in it. I was then obliged to have it picked by a locksmith. His said letter is in my possession.

At the time of Mr. Forrest's separation from me, he was engaged in a furious controversy with Mr. Macready, which ultimately led to shocking violence and bloodshed, and the loss of many lives ; and during the whole progress of that controversy, Mr. Forrest did his utmost to attract public attention to it.

- 2648 Mr. Forrest asserts, on information and belief, that previously to December, 1849, I had, on frequent occasions, and to divers persons, misrepresented the cause of our separation, and had ascribed it to the misconduct of Mr. Forrest, and had alleged that it arose from my opposition to his course in a controversy with Mr. Macready. He states further, that this misrepresentation, in his judgment, reflected so deeply upon his character that he felt compelled to vindicate himself by a resort to the tribunals of his country. From circumstances,
- 2649 I verily believe every part of this statement of Mr. Forrest to be absolutely untrue. In the first place, prior to December 24th, 1849, I never did tell any one (except my sister Margaret, and what little I said to Mr. Lawson) anything about the cause of our separation ; and I told her the truth, i. e., that the assigned cause, and the only cause of which I had any knowledge or assurance, was my contradicting Mr. Forrest's remark about her. In the next place, Mr. Forrest has never offered any proof of the said assertion, made by him on information and belief ; and if he had any informant, he
- 2650 could produce him. Prior to December 24th, 1849, I never did, directly or indirectly, ascribe our separation to the misconduct of Mr. Forrest, unless the above statement to my sister was such ascription, or alleged that it arose from my opposition to his course in the controversy with Mr. Macready, or in any way misrepresent the cause of said separation. I insist that if any one did impute our separation to a disagreement about the Macready controversy, it would have been an advantage to Mr. Forrest's reputation. All his friends

knew that the separation was *his* act; he says that he meant to assign no reason for it, and had promised me, 2651 in case of no new delinquency on my part, to right and defend me against any insult. I appeared to be an innocent and unimpeached wife, put away *without any cause* by the arbitrary will of a husband. This would have placed Mr. Forrest's character and conduct in the worst light that could have been reflected upon it. It was, I submit, an extenuation of his apparent misconduct, if any one, in charity towards him, represented that we had a disagreement about the Macready business, which induced a separation. I would observe further on this head: It was easy to see that the public would impute 2652 our separation to that affair, if no other cause was assigned for it. Any one would expect it. I told Mr. Forrest that such would probably be the case, and he must have expected it.

I think I can prove clearly that he never believed me to be the author of any such representation, and that the vindication of his character from this or any other imputation had nothing to do with his application for a divorce, as he now untruly pretends.

His counsel and mine met on the twenty-ninth of January, 1850, as stated in my former affidavit. I am informed by my counsel, and verily believe that the 2653 counsel of Mr. Forrest suggested that very gently-insinuated charges of deviations from strict propriety, not recognizable at law, would probably be deemed sufficient by the legislative committee, and that Mr. Theodore Sedgwick, professing to act for Mr. Forrest, gave my counsel the most positive assurances that even these charges and the proofs by which they might be made to pass should be scrupulously concealed and forever hidden from the public view. My counsel, as I am informed and believe, to the great dissatisfaction of Mr. Sedgwick, replied that to conceal the legislative action of a sovereign State seemed to him a vain undertaking; 2654

that if attempted and otherwise practicable, the public attention would be drawn to this apparently groundless divorce, and not only the members of the legislature, but Mr. Forrest himself would be constrained in their own justification to publish the grounds, the proofs, and Mrs. Forrest's consent, amounting to a virtual confession. My counsel has his correspondence with Mr. Sedgwick dated in January and February, 1850; and I can prove all these facts fully. I have the written proposition of Mr. Forrest's counsel. Mr. Sedgwick, sent to 2655 me through Mr. William C. Bryant in February, 1850, one clause of which is—

“Fourthly.—Mr. Forrest will pledge himself to
 “some mutual friend that he will not give any publicity to the charges or testimony adduced in the
 “application; and will prevent any publicity being
 “given them by others now or hereafter. He
 “engages also that the application will be couched
 “in the most delicate and general terms possible,
 “and contain no charges which may be unnecessary
 “to the object of obtaining a divorce.”

2656 “Mr. Sedgwick will, at any time that may be
 “desired, communicate with Mr. O'Connor in relation to this matter.”

It will be seen, therefore, that “*the object*” of all his threats and invectives, from the 24th of December, 1849, to the middle of February, 1850, was not to vindicate his character, as he now represents, but for “*obtaining a divorce.*” I do not think Mr. Forrest so weak as to abandon his wife in New York, and to seek from the 2657 legislature of another State a law exonerating his character from her reproaches. His object must have been different.

When Mr. Forrest called at Mr. Godwin's house on the 31st of May, 1849, to see me, he said that he should in all probability remove his sisters from Philadelphia to Font Hill, some time during the summer, and that

they were to keep house for him there. I am informed and believe, that he continued the building or finishing of the large house, and some time during the month of November, 1849, purchased additional furniture for his library therein.

As Mr. Forrest chooses to make public our intercourse 2658 in relation to his controversy with Mr. Macready, I will state the facts.

We certainly had serious differences about Mr. Forrest's conduct towards Mr. Macready. I strongly disapproved of his hissing Mr. Macready in Edinburgh in 1846, and remonstrated with him for the manner in which he spoke of Mr. Macready, prior to his (Macready's) arrival in this country in 1848. I objected to Mr. Forrest's habit of stating on all occasions, in promiscuous companies, his determination to have Macready 2659 driven from the stage, and to Mr. Forrest's leaving money at Boston, and sending some to New Orleans in 1848, for the furtherance of the above object, as Mr. Forrest informed me he had done.

Mr. Forrest frequently became very angry with me about this, as he attributed the part I took in the matter to my English feeling. I repeatedly assured him it was not so, but that I thought he compromised his own dignity by the violence of his opposition. When, however, Mr. Macready made a speech which conveyed to my mind an insult to my husband, I felt as a wife most anxious 2660 that he should resent it. When I wrote to Mr. Forrest, well knowing the state of excitement under which he was laboring, I said everything I could to encourage, and nothing to oppose him. On my joining him in Philadelphia in the autumn of 1848, he asked me again to tell him more particularly how I approved of his "card." I then said I regretted he had inserted any epithets, upon which he became very angry, and blamed me for want of sincerity in my letter to him, and I told him what was true, that I preferred speaking anything which

2661 might not be agreeable, to writing it; especially under the circumstances, when surely it was not the part of a wife to add to his vexations—that when many joined in blaming him, even if I had thought him more in the wrong than I did, I could not say so. The terms “Mac,” “*superannuated old woman*,” etc., are quoted from Mr. Forrest’s own words and letters. His said letters are in my possession.

Mr. Forrest was wrought up to such a state of excitement about Macready, that his friends feared lest he should utterly lose his reason, and I could not have 2662 attempted to control or oppose him.

I never urged him to violent measures against Mr. Macready.

If I had imputed our separation to the Macready controversy, it is not certain that I should have done Mr. Forrest any injustice. I can hardly impute so grave an act to the cause assigned. His angry and vindictive passions appeared to be daily gathering new strength and acquiring most perfect control over him from the moment when the English public in 1846, in- 2663 fluenced in whole or in part as he supposed by Macready, appeared to slight him. I had not approved his course against Macready unqualifiedly, and in all things, and I might well have attributed the separation to this cause. But there were other causes, and I could not be sure what was the leading one, or whether it was not a result of many causes. I had ample reason to believe that Mr. Forrest was in correspondence with a woman of respectable connections, but of bad reputation.

To this cause, in fact, in my own mind, I mainly attributed his desertion, and my hope of reclaiming him 2664 hung upon the slender expectation that he might become tired of that attachment.

Although during the period subsequent to our return from Europe in 1846, my strong affection for Mr. For-

rest was often sorely tried by unseemly and violent ebullitions of passion, by a disposition at times to be so sullen and morose that his best friends scarcely knew how to approach him, and by a morbid feeling on his part that he was not appreciated by the world ; yet, until the last few months of our married life, I always felt a confidence that a cessation of professional labor 2665 would restore tranquillity to a mind rendered unsteady by the unbounded indulgence of self-will and evil passions, and that he would at length appreciate the affection which had uncomplainingly endured so much. But from an early period in 1848, hope almost deserted me.

I never said to James Lawson that I had asked Mr. Forrest whether he had a word to say against me as a wife, nor did I ever tell Mr. Lawson that Mr. Forrest said, " No, Catharine, no, and would to God I could, for then I should not suffer the agony I now feel." All 2666 that Mr. Lawson has testified to on that subject in his affidavit in this action, taken before Joseph Strong on the 15th November, 1850, is utterly untrue. No conversation of the kind, nor anything bearing the least resemblance to it, ever took place between me and Mr. Lawson. The relation which Mr. Lawson holds to Mr. Forrest, the total absence of any foundation for this statement, the course Mr. Lawson has pursued in this business, and the unquestionable untruth of his said affidavit in another respect, warrant me in saying that this statement is not a mere mistake on his part. When 2667 my action is tried, if Mr. Lawson should appear as a witness, and I earnestly hope that he may, I will be able to prove, as I verily believe, the matter of my former affidavit concerning him, by at least two other witnesses testifying precisely to the same effect as Mr. Parke Godwin.

Mr. Lawson has misrepresented the matter of his letter in my behalf to my father. Mr. Lawson is a countryman of my father. I thought he was my father's

friend and mine, and I now think he was ; but it has become his interest to act in hostility to us. I wrote
 2668 him a note, requesting him to write to my father for me, breaking to him the ill news of our separation. He wrote accordingly, as I know ; for my father returned me the original letter. On the 2d of May, 1849, Mr. Lawson sent me a copy of his letter to my father, and his reply to my said note. They are in my possession, and are in the following words :

2d May, 1849.

MY DEAR MRS. FORREST,

Your note came to me last evening as I was going home, but I did my best in obeying your mandate ; it was a difficult task. A copy is herewith, which please
 2669 preserve, or after you have perused it, perhaps I had better hold.

Forrest came this morning. I told him I was your friend as well as his ; that I had no disguise from either, and mentioned that I had received a note from you, which, if he wished to see, was at his service. He read it, he read too the letter referred to. He exhibited much feeling and approved my course ; I may talk freely to him of you. His deep feeling and his estrangement make me wonder, all is a mystery.

I shall call on you first moment. I trust you approve of what I have done as he does. He was very angry
 2670 about the Atlas article ; had not seen it till it appeared in the Herald. Southworth wrote it, he supposes, and on Monday, ignorant of the article, met him, and was kind to him.

Ever yours truly,

J. L.

New York, May 1st, 1849.

JOHN SINCLAIR, Esqr., London.

Dear Sir :—This afternoon, Mrs. Forrest addressed me a note requesting me to write to you by this

steamer, from which I infer that you are unadvised of some unpleasant circumstances that have happened in 22d street. It is an irksome task, but rather than any 2671 intimation should first reach you through the newspapers, and in obedience to her wish, I write. In her note to me, Mrs. Forrest says : " You are the only person, except myself, who could, with propriety, write " to my father on the subject, a very few lines will suffice ; I will write by next steamer."

On Saturday last (28th April), Mr. Forrest took your daughter to the house of Mrs. Godwin (Mr. Bryant's daughter), and there left her with the intention of a formal separation. The cause of this separation I do 2672 not know, and neither party may ever disclose. It is now about three months since the first intimation of a difference came to my knowledge, yet with the exception of a week or two at most, during which I remarked an extravagance of feeling, nothing was apparent in the conduct of either to warrant these events ; it seemed impossible, but it has happened. Those who constantly visited them could not perceive anything in the conduct of either to make such an event necessary, or even probable.

From the time this unhappy affair was concluded on between them, Mrs. Forrest has conducted herself, as 2673 she always does, with admirable discretion, not a murmur has escaped her lips. Mr. Forrest has always been kind and considerate, and nothing in his conduct gives warrant for angry feelings or unkind treatment. He thinks he has made a self-sacrifice for some high principle ; what, I know not.

I am persuaded that both parties are still warmly attached to one another ; he, judging by his looks, has suffered deeply, and has grown ten years older during the last few months ; she is not less afflicted. These things all considered make this separation appear a 2674

mystery, which I cannot fathom. Time may do much for both.

Of one thing I can assure you, your daughter's honor is unsullied. No breath of suspicion can touch it, and all who know her will bear testimony in her favor. The mutual friends of both parties remain the friends of each, which I am sure is pleasing to Mr. Forrest and to her, as it must be gratifying to you to know. No effort shall be left untried to bring about a reconciliation, but I dare not hold out the hope of a successful issue.

2675 Virginia is with Mrs. Forrest; Margaret remains at her former lodgings, her baby is a fine child. All are well in health.

Mrs. Lawson joins me in kindest regards to Mrs. Sinclair. With best wishes for your health and happiness, and that you may hear these tidings with a firm nerve, is the present hope of

Dear sir,

Yours very truly,

JAMES LAWSON.

It will be seen that Mr. Lawson, under his own hand, written at the very time, declared that Mr. Forrest *read and approved* his letter to my father, containing the assertion of my innocence; yet now, it seeming to be
2676 necessary for his employer's purpose, he testifies that said letter was sent without Mr. Forrest's knowing its contents. He told me about the time, that Mr. Forrest had read and approved it. I understand and believe that he so stated to others.

As to Mr. Lawson's desire for a reconciliation between Mr. Forrest and myself, I do not deny it; he was ready to serve Mr. Forrest at all times. The amount of his efforts I will briefly state. He called on me in October, 1849, and said that he had had a long conversation with Mr. Forrest, and that he had every reason to believe that
2677 a reconciliation between Mr. Forrest and myself was by

no means impossible, on the contrary, that Mr. Forrest entertained very different views on many subjects since his separation from me, and wished to come and see me, but would not, unless he could be sure not to meet Mrs. Voorhees. Mr. Lawson then suggested that Mrs. Voorhees should leave the house in order to conciliate Mr. Forrest. Some few evenings after this conversation, Mr. Lawson called again, and said that Mr. Forrest was most anxious to know whether I had consented to send my sister away, and further, that Mr. Forrest had remarked, "by this I will test her affection for me, if she 2678 has any." I told Mr. Lawson that we had taken the house in Sixteenth street together, and made all our arrangements to stay there during the winter, it would be most inconvenient for my sister to leave, and that his suggestions should have been made prior to the taking of the house; Mr. Lawson said, "I'm sure for the furtherance of such an object, she would consent to go for a week or two." I replied that I could not ask her to do so, but would tell her the substance of our conversation, and would let him know her determination the following day when I should call on him for my quar- 2679 terly allowance. After his departure, my sister and I had some conversation on the subject, and she at once determined to leave the house and remain away during the space of two months, which she accordingly did. On the morning after Mr. Lawson's last visit, I wrote the following note, which I gave to him myself, and which he informed me he immediately sent by Mr. Stevens to Mr. Forrest, at Font Hill; Mr. Forrest being, as he said, most impatient to know my determination.

TO JAMES LAWSON, Esq.,

2680

My Dear Sir:

Immediately after your departure last evening, I told my sister the subject of our conversation, and what had been your former suggestion (of which she was not

previously aware). Without further consultation, she at once proposed to leave the house on Monday, and I consented that she should do so, feeling sure that you would not urge a step which is one of some importance, and attended with, at least, temporary, extreme pecuniary embarrassment, unless you had some reliable ground to suppose it would further a good object. That your motives are the purest and best I have no doubt; that your chief aim in this, is to effect a reconciliation between Mr. Forrest and myself, you avow; whether you act wisely in assuming this most heavy responsibility you best know, but as I said last night, you are working blindfold, not knowing the causes which led to the present state of things, and, as you told me, with Mr. Forrest's assurance to you that we could not live happily again together. Of this you cannot be so good a judge as he is, who weighed all the circumstances and considered the matter of our separation for many months before it took place. I do not feel equal to entering now more fully upon the subject, and I follow your advice willingly, but without one ray of hope. I write hurriedly that you may have this to-day; and briefly, as I have not slept since I saw you, and I am sick at head and heart.

Yours, &c.,

CATHARINE N. FORREST.

Mr. Lawson called on me and said he should go to Font Hill on the following day (Sunday), and that he would have a conversation with Mr. Forrest, and that he had no doubt, in fact, from what Mr. Forrest had already said, he would assure me, that within one week he and Mr. Forrest would come and dine with me in 16th street.

I heard no more from Mr. Lawson until a fortnight after, when he wrote me a note enclosing a bill which

had been sent to Mr. Forrest by a milliner for some bonnets she had made for me, prior to my separation from Mr. Forrest.

Mr. Lawson called on me one or two evenings prior to this correspondence ; but I declined seeing him ; in the first place, because I felt hurt at being trifled with on a matter of such importance, and, in the second place, because I wished to receive any communication he might have for me in writing. He wrote me, as he 2684 states, December 1, 1849. His letter contained additional matters, which he has omitted. I give the balance of it and my answer to it.

“ I received your note of Tuesday evening ; you still
 “ labor under a misapprehension. You write unkindly,
 “ nay harshly to your best friend. Never since I first
 “ knew you, to this hour, have I left a word unsaid, or
 “ an act undone that would please or serve you. If I
 “ understand you rightly, people have convinced you
 “ that I am your enemy—Who are these people, what
 “ am I accused of? I am willing to plead before any 2685
 “ one, or all of them at once. Ready at all times to
 “ confess the truth, but firm to repel what is untrue.
 “ Not knowing how I might be received after two
 “ such epistles, I have written this, which I should
 “ much prefer to have spoken. I am, my dear Mrs.
 “ Forrest,

Yours kindly,

J. L.

To this I replied :

Dear Sir:—About a fortnight ago, I received a note from you which wounded me so deeply, that I could not resolve to reply to you, my mind had been wrought up to such an intense state of excitement and anxiety, 2686 and I was so much weakened by illness, that I feared I should be again misunderstood if I were to express myself as I felt. Though I have suffered deeply during

the whole time that these negotiations were pending, I never impugned your motives for acting as you did. I only blamed you for deceiving me as to the state of Mr. Forrest's feelings, and for giving me hopes which had no grounds, but in your own imagination; but in conveying to me the failure of your attempts, you broach topics which are understood by none save Mr. Forrest and myself; and express opinions which I am certain Mr. Forrest never sanctioned; we discussed our own affairs long enough to preclude the necessity of our having any one to interpret them for us. When I saw Mr. Forrest subsequent to our separation, he gave me every assurance of his belief in my sincerity, and that faith I have done nothing since to forfeit. Prior to these last few weeks, I had always entertained a hope and belief, that time alone could heal the existing breach, and that when the reflection of years had soothed some present asperities, we might both be again comparatively happy; for this reason I have discouraged all interference in the matter, and have permitted no one to question or discuss Mr. Forrest's motives or conduct in my presence. I conceived the second note which I wrote to you, and to which you refer, to be an explanation of my first, and called at your house the day I sent it (when I was extremely unwell), in order to show you that I had no unfriendly feeling to you. I have always welcomed you as a friend, for, till now, I have thought you one; those who knew better than I did, said you could not be so to both parties, but I, conceiving our interests (Mr. Forrest's and mine) to be inseparable, acted accordingly. Mr. Forrest and I parted FRIENDS. I learn with sadness, that his feelings have changed, and to *you alone* can I ascribe the blame. That this should be a matter of little importance to you, I can understand; I am not in a position to make it of consequence, but your Christmas will gain nothing in mirth or content by the reflection that you have wounded one.

already suffering deeply, and without kindred or friends 2690
in the whole country, on whom she has a right to rely.
With much respect and some sorrow thus to close a
friendship of twelve years standing,

I remain, &c.,

CATHARINE N. FORREST.

In his affidavit, sworn before John Livingston, Pennsylvania Commissioner, February 28th, 1850, mentioned in my former affidavit, Mr. Lawson made the following statement :

"On the first day of February instant (1850), Mrs. Underwood called at my office, No. 82 Wall street, on private business, and then communicated to me, for the first time, her knowledge of the facts contained in 2691 her deposition. Mr. Forrest was then absent from the city of New York, and, upon his return a few days afterwards, I communicated to him the result of my interview with Mrs. Underwood, and have no doubt that this was the first knowledge Mr. Forrest had of the nature of the facts stated in that deposition, at all events through me."

This was upon the third day after my counsel had distinctly announced, that no divorce for criminality could be obtained by my consent. The word "result" and other circumstances show, and I believe, that the 2692 object of that interview was to induce Mrs. Underwood to make a statement against me, and that the mode of attaining that object was preconcerted between Mr. Forrest and Mr. Lawson. I cannot procure voluntary affidavits, but I am informed, and verily believe, that I can prove, on any trial where it may be relevant, the representation repeatedly made by said Lawson to his intimates, that the instant Mr. Lawson communicated this "result" to him, Mr. Forrest dropped upon the floor, with such suddenness and violence that he hurt himself considerably. This was five weeks after his 2693 letter of 24th December, charging me with impurity.

It was quite true that Mr. Lawson asked me who was wrong in the unknown cause of our separation, and that I answered that "I was." My protest to the Pennsylvania Legislature, my former affidavit, my omission here to deny the unbecoming word imputed to me, are all equal admissions of that fact. I did not say to Mr. Lawson, "Ah, sir, the difficulty in our case is that a third party knows it," nor anything to that effect, or
 2694 say anything nearer to it than is hereinafter stated.

He says these were my very words. I deny it absolutely. I believe that these words, and the words last quoted in his affidavit, were written for Mr. Lawson by one whom he cannot disobey.

I am quite sure Mr. Lawson said nothing to me about repentance or atonement. I gave him the idea that the cause was an insult, Mr. Forrest could not get over; I think he said something about no one else knowing it, and that I said one other person did know it, I meant
 2695 my sister Margaret, but did not name her. Mr. Forrest's expressed wish for its concealment bound me to conceal it from all except my sister.

Mr. Forrest speaks of another affidavit in his possession, containing a charge against me. The fact alleged never occurred, and as he has not ventured to name his witness, or even the alleged participator, I can give no further answer to that imputation.

I did not furnish for the press a copy of my complaint in the action for an absolute divorce, as alleged
 2696 by Mr. Forrest. My counsel, as I believe, used his best exertions to keep it concealed, and for that purpose prevented it from being filed. I believe that a copy was obtained from my attorney's office, and sent to the press by a person friendly to me. If I had sent it, Mr. Forrest would have no right to complain. He has, by himself and his well-known agents, been continually vilifying me in the public prints, as I am fully assured. A lengthy and most scandalous attack upon me, made

months ago in a Philadelphia paper, was immediately sent by him to me, by mail. I have the envelope, addressed in his own handwriting, and a witness who can 2697 prove these facts, identifying the paper and envelope, and their receipt by me through the mail.

Some time in November last, I was introduced for the first time to an eminent member of the bar, who was just then retained for me, at the office of my attorney. On the same day, at about one o'clock P. M., as I was returning from said office, through Broadway, to my house, Mr. Forrest met and passed me near Barclay street, almost touching me, and brushing by in such a rapid way as for the moment to startle me considerably. 2698 The gentleman last mentioned, passing the same way towards the City Hall, happened to overtake me, a moment after, and politely addressed me. Mr. Forrest immediately returned, and spoke to me with great rudeness. A few days afterwards (November. 29th, 1850) I was proceeding down Broadway to my counsel's office, in an omnibus. Mr. Forrest entered, and addressed me very rudely and insultingly, in the presence of a number of persons, asking about my "paramour," as he expressed it, referring to the said last-mentioned gentleman, by name; and threatening to send me to the State prison. 2699

CATHARINE N. FORREST.

Sworn before me, this 20th }
day of December, 1850, }

IRVING PARIS,
Commissioner of Deeds.

COPY OF CHARGE AND ANSWER.

[CHARGE.]

As she, the said plaintiff, believes, the said Edwin Forrest, disregarding the solemnity of the marriage vow,

has, since the marriage of her, the said plaintiff, with
 2700 him aforesaid, committed adultery at divers times
 and places, and with divers women; and especially he,
 the said Edwin Forrest, did oftentimes commit adultery
 with a certain play-actress, now deceased, at her resi-
 dence, known as number in White
 street, in the city of New York, on divers days, to her,
 the said plaintiff, unknown, in the years one thousand
 eight hundred and forty-two and one thousand eight
 hundred and forty-three; and also on sundry days, to the
 said plaintiff unknown, with the same actress, at French's
 Hotel, in Norfolk, in the State of Virginia, whilst he,
 2701 the said Edwin Forrest, and said actress were both
 there boarding, in the year one thousand eight hundred
 and forty-two, and also on sundry days, to the said plain-
 tiff unknown, in the year one thousand eight hundred
 and forty-four, with the said actress, at Earl's Hotel in
 Providence, in the State of Rhode Island, whilst he, the
 said Edwin Forrest, and the said actress were both there
 boarding. And also with one
 frequently, on days and times, to the said plaintiff un-
 known, between the twenty-ninth day of March, one
 thousand eight hundred and forty-seven and the present
 2702 time, at the house number Wooster
 street, in the city of New York; and also with the
 said in a certain other house in
 Houston street, between the days last aforesaid, habitu-
 ally on Tuesdays, and frequently on other days, to her,
 the said plaintiff, unknown, in a certain other house in
 Houston street, in the same city of New York; and
 also with the said in the same
 house, in Wooster street, on the thirtieth and thirty-first
 days of March, in the year one thousand eight hundred
 2703 and forty-seven; and also habitually from and between
 the fifth day of September, one thousand eight hundred
 and thirty-seven, and the first day of December, one
 thousand eight hundred and thirty-eight, with divers

women, to her, the said plaintiff, unknown, in a certain house, in the city of New York, known as number four hundred and seventy-four Broome street, occupied by a woman named ; and also in the summer of the year one thousand eight hundred and thirty-eight, on three several occasions, in a certain house, on the westerly side of Cherry street, between Market street and Pike street, in the city of New York, with a certain woman, to the said plaintiff wholly un- 2704 known ; and also on divers days and times, between the seventeenth day of June, one thousand eight hundred and fifty, and the present time, at the city of New York, and at New Brunswick, in the State of New Jersey, and at Philadelphia, in the State of Pennsylvania, with a certain woman called and sometimes called Mrs.

[ANSWER.]

And this defendant denies, that since his marriage with the plaintiff, he has committed adultery at divers times and with divers women, or that he committed 2705 adultery with any or either of the women mentioned and referred to in said complaint, *at any or either of the times or places stated in the complaint.*

SUPREME COURT.

| | |
|----------------------|---|
| CATHARINE N. FORREST | } |
| <i>agst.</i> | |
| EDWIN FORREST. | |

City and County of New York, ss.

Charles S. French, of said city, clerk in the office of Henry H. Leeds & Co., auctioneers, doing business at

2706 No. 8 Wall street, in said city, being duly sworn, says as follows :

On the second day of November, 1849, the above named Edwin Forrest purchased of Henry H. Leeds & Co., at their said place of business, two covered sofas, for the price or sum of one hundred and sixteen dollars. At the time of said purchase, Mr. Forrest gave directions to have the sofas sent over to the North River, to be transported up said river, to his place, known as Font Hill, in Westchester county, which was accordingly done.

2707

C. S. FRENCH.

Sworn before me, this }
20th day of Dec., 1850. }

D. HOBART,

Commissioner of Deeds.

SUPREME COURT.

CATHARINE N. FORREST,

agst.

EDWIN FORREST.

City and County of New York, ss.

2708 Parke Godwin, of said city, being sworn, says as follows: I know Mr. James Lawson. In the year 1849, shortly after the separation of Mr. and Mrs. Forrest, I had a conversation with said Lawson about the probable cause of said separation. Mr. Lawson said that there could not have been any criminality on her part, as Mr. Forrest had stated the contrary. He then explained the way in which that statement was made. He said on one occasion, that observing Mr. Forrest to be moody and discontented, he spoke soothingly to him, said that he, Lawson, had no doubt things would be all settled and reconciled between him and Mrs. Forrest; that

everything would be made satisfactory to him, Mr. For- 2709
rest ; that, under circumstances, even criminality might
be forgiven, He stated that upon this, Forrest turned
abruptly upon him and replied, " criminality ! there is
no crime in the case ; would to God there was." My
strong impression is, that Mr. Lawson stated this con-
versation to have taken place during a trip taken by him
and Mr. Forrest to Font Hill, but of this last fact, I am
not, at this moment, perfectly certain.

Just after the separation, whilst Mrs. Forrest was
living at my house, Mr. Lawson read to me in his own
office, in Wall street, a letter which he had just written 2710
to John Sinclair, the father of Mrs. Forrest. He stated
to me that Mr. Forrest had seen the said letter, and
had approved of it. I know Mr. Lawson's handwriting
very well. I saw yesterday a copy of a letter in
the handwriting of said Lawson in the hands of Mrs.
Forrest, dated May 1, 1849 ; I believe it to be a true
copy of the letter so read to me. I remember that the
letter so read to me contained the assurance to Mr.
Sinclair that his daughter's honor was unsullied.

PARKE GODWIN.

Sworn before me, this 6th day }
of December, 1850. }

2711

THOS. HYSLOP,

Comr. of Deeds.

SUPREME COURT.

CATHARINE N. FORREST,

agst.

EDWIN FORREST.

City and County of New York, ss.

Granby Calcraft, of the said city, being duly sworn,
says as follows :

2712

I am Her Britannic Majesty's agent for Packets, at the port and city of New York ; am an Englishman, and a friend of John Sinclair, the father of the above named Catharine N. Forrest, and, from my acquaintance with him, was introduced by him to his daughter, previous to her marriage with Mr. Forrest.

After a residence of nearly a year in New York, I was again introduced to Mrs. Forrest, and also to her husband, and, upon their invitation, became a visitor at their house in Twenty-second street, where I was accus-
 2713 tomed to visit them, as is usual with persons who are on terms of familiarity. These visits, as I then supposed and believed, were with his entire approbation ; and I was accustomed to call upon him almost weekly, on the day which was set apart for the reception of his friends, the visitors on those occasions being usually received in his library, up stairs.

I have recently read in the New York Herald an affidavit, purporting to have been sworn to by Mr. Forrest, in which my name is introduced, and alleged acts and conduct attributed to me, as having occurred at his
 2714 house in Twenty-second street, which allegations are wholly untrue. Mrs. Forrest, to the best of my knowledge, information, and belief, is a perfectly modest, chaste, and virtuous woman. I never saw, or, until within a year, heard anything to the contrary. I never saw her, in the slightest degree, intoxicated or affected by wine or any other liquor, and I do not believe she ever was so. I remember the circumstance referred to in the affidavit of Mr. Forrest, of my having dined at his house, and also on another occasion of having as-
 2715 sisted Mrs. Voorhees to bring a tray and some glasses from the dining-room, up the stairs, into the library room.

My having dined there happened under the following circumstances : I had called in the afternoon to pay a visit to Mrs. Forrest and Mrs. Voorhees, and, as I

was about to take my departure, the dinner bell rang, upon which I remarked in a half jocular tone, "were it in England, Mrs. Forrest, I think I should almost venture to presume upon an acquaintance of twelve years, to solicit hospitality at your hands, as I have an engagement up town, at seven o'clock, and it will save me a long jolt down town, having to return up again almost immediately." I do not, of course, pretend to 2716 give the exact words, but the substance in which the permission to remain was asked and accorded. Mrs. Forrest said, "as only my sister and myself are here now, you will find no dinner, but you may remain and take your chance, if it will be any convenience to you." I did remain, and I have no doubt that I assisted in carving, but, that such assistance was rendered necessary from the cause stated is entirely untrue—it was mere courtesy on my part. Mrs. Voorhees, her younger sister, nurse, and child; were in the dining-room during the whole of the dinner, and Mrs. Voorhees remained in the room, or was not absent therefrom more than a moment 2717 at a time, until my departure, which was immediately after dinner, and before seven o'clock, P. M. The other circumstance, before referred to, happened on an occasion when I had been driving out of town, to Font Hill Castle, to show the place to an English gentleman, who was then travelling through the States, and who having expressed himself much pleased with all he had seen there, I urged him on our return into town (as we, of necessity, had to pass so near Twenty-second street) to call at Mr. Forrest's house, where I would introduce him, and that he should express to them the pleasure he had 2718 enjoyed in viewing Font Hill. We accordingly called, and found Mrs. Forrest and Mrs. Voorhees at home. As we were about to leave, we were asked if we wished a glass of wine and water, Mrs. Forrest adding, "you will have to go down stairs for it, unless Margaret will go and fetch it, as I forgot to tell the servants to prepare the

tray before going to bed." I said I would assist Mrs. Voorhees in bringing it up, and did so. We left said house by about half-past eleven o'clock that evening. During our visit that evening, Mrs. Forrest, Mrs. Voor-
 2719 hees, my friend, and myself, all remained in the room together, with the exception of when Mrs. Voorhees and myself left to bring the refreshments, which did not occupy more than a very few minutes.

I most positively affirm that Mrs. Forrest was never half lying, or half sitting in or on my lap, or with her arms on my breast, or around my neck ; nor was she in any degree on my lap, nor had she ever her arms, or either of them on my breast or around my neck. I never
 2720 was in any dining-room or other room with her when the door was locked, nor did there ever anything occur between her and myself which could offend the strictest sense of decorum and morality.

Anything which may have been said by any one, to the contrary of the preceding statement, is wholly and absolutely untrue.

I was walking to the post office September 25, 1850, at about 10 o'clock, A. M., when, (I think,) just below Fulton street in Broadway, I passed Mr. Forrest. I stopped opposite a post in a position to peruse the
 2721 steamer announcements fixed upon it. The first intimation I had of his increased proximity to me, (as I did not notice his turning back,) was his exclaiming in an abrupt and excited manner, " When are you going to England," or " are you going to England," repeated in the same abrupt way several times. I was somewhat surprised by this singular greeting, and my first impulse was, to pass on without replying, but to avoid being misconstrued, I first, (I believe,) said " are you addressing me, Mr. Forrest ?" and afterwards on his repeating his quere, I added: " If you will address me in a more
 2722 courteous tone, I shall be happy to answer you ;"—upon which he repeated the amount of it, (or a phrase.

to that effect,) is, "I want to know if you are going to England or *not*;"—and he added several times without giving me time to reply, in the same hurried and excited manner; "you had better go to England;" or, "I *advise* you to go to England;" one or other phrase several times repeated. I replied, but not discourteously, "I have no idea, at present, of going to England;" "that is my own affair;" and afterwards added: "I have to proceed to the post office on business, (or duty,) and ought to be there now, but if you wish anything further 2723 of me, you know very well where I am always to be found."

GRANBY CALCRAFT.

Sworn December 13th }
1850, before me, }

C. B. WHEELER,
Commissioner of Deeds.

SUPREME COURT.

CATHARINE N. FORREST,

against

EDWIN FORREST.

City and County of New York, ss.

Charles Condit, of the said city, attorney-at-law, being duly sworn, says as follows: On the 12th day of December, 1850, I found in the records of the Legislature of the Commonwealth of Pennsylvania, at the Capitol of said State, at Harrisburgh, a paper purporting to be an original petition for a divorce, presented by the above-named defendant, to the House of Representatives of said State, on the twenty-first day of February last. It purports to bear the original signature of Mr. Forrest, and as I believe truly. It is a substantial copy of the

petition of Mr. Forrest which was presented to the Senate, and contains the following words :

2725 "That your petitioner was born in the city of Philadelphia, on the ninth day of March, in the year 1806, and resided in the said city until he established himself in the city of New York, in or about the year 1837, where he has resided till on or about the first day of December, 1849, when he resumed his residence in the city of Philadelphia."

CHAS. CONDIT.

Sworn to before me, this 21st }
day of December, 1850. }

IRVING PARIS,
Commissioner of Deeds.

[NOTICE OF MR. FORREST'S MOTION TO SET ASIDE IN-
JUNCTION.]

NEW YORK SUPREME COURT.

CATHARINE N. FORREST,

against

EDWIN FORREST.

GENTLEMEN :

2726 Please to take notice that a motion will be made in the above entitled cause (the first suit) at the Special Term of this Court, to be held at the City Hall, in the city of New York, on the 23d day of November, instant, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, that the injunction issued in this cause (*see it page 677.*) be vacated ; or for such other rule or order as the Court may see fit to grant in the premises : which motion will be founded on affidavits of

which the within are copies, and on the complaint and answer in said cause.

[See complaint, pp. 623 to 637. See answer, pp. 679 to 2727 691. See *Mrs. Forrest's affidavit*, pp. 691 to 728.]

Nov. 15, 1850.

Yours, &c.,

VAN BUREN & ROBINSON,
Defendant's Attorneys.

To HOWLAND & CHASE,
Plaintiff's Attorneys.

POLL LIST OF ELECTION DISTRICT NO. 2—*held in the
Town of Yonkers, Nov. 6th, 1849.*

| | Assess'y. | Judic'y. | State. | School | |
|-----------------------------|-----------|----------|--------|--------|------|
| 1. John Stevens..... | 1 | 1 | 1 | 1 | |
| 2. Stephen Simmons..... | 1 | 1 | 1 | 1 | 2728 |
| 3. John Dickenson..... | 1 | 1 | 1 | 1 | |
| 4. Wm. J. Majory..... | 1 | 1 | 1 | 1 | |
| 5. John Avery..... | 1 | 1 | 1 | 1 | |
| 6. John L. Berrien..... | 1 | 1 | 1 | 1 | |
| 7. John Darke..... | 1 | 1 | 1 | 1 | |
| 8. Henry Husner..... | 1 | 1 | 1 | 1 | |
| 9. Epenetus Purdy..... | 1 | 1 | 1 | 1 | |
| 10. Jacob Post..... | 1 | 1 | 1 | 1 | |
| 11. James Williams..... | 1 | 1 | 1 | 1 | |
| 12. William L. Morris..... | 1 | 1 | 1 | 1 | 2729 |
| 13. Alexander Ferguson..... | 1 | 1 | 1 | 1 | |
| 14. Abram Ryder..... | 1 | 1 | 1 | 1 | |
| 15. States Briggs..... | — | 1 | 1 | 1 | |
| 16. Edward B. Laurence..... | 1 | 1 | 1 | 1 | |
| 17. Gideon Raynolds..... | 1 | 1 | 1 | 1 | |
| 18. Caleb Van Tassell..... | 1 | 1 | 1 | 1 | |
| 19. William Furgeson..... | 1 | 1 | 1 | 1 | |
| 20. James M. Browh..... | — | — | 1 | 1 | |
| 21. L. J. Umsted..... | 1 | 1 | 1 | 1 | |

| | Assem'y. | Judic'y. | State. | School. |
|----------------------------------|----------|----------|--------|---------|
| 22. Patrick Roderick..... | 1 | 1 | 1 | 1 |
| 2730 23. Patrick Reynolds..... | 1 | 1 | 1 | 1 |
| 24. Patrick Rogers..... | 1 | 1 | 1 | 1 |
| 25. Andrew Wasner..... | 1 | 1 | 1 | 1 |
| 26. William Cerey..... | 1 | 1 | 1 | 1 |
| 27. Hugh Riley..... | 1 | 1 | 1 | 1 |
| 28. Stephen Sherwood..... | 1 | 1 | 1 | 1 |
| 29. Matthias Warner..... | 1 | 1 | 1 | 1 |
| 30. George Hadley..... | 1 | 1 | 1 | 1 |
| 31. Jacob Valentine..... | 1 | 1 | 1 | 1 |
| 32. Theodore Streets..... | 1 | 1 | 1 | 1 |
| 33. David Murray..... | 1 | 1 | 1 | 1 |
| 2731 34. Samuel B. Thompson..... | 1 | 1 | 1 | 1 |
| 35. Abraham Berrian..... | 1 | 1 | 1 | 1 |
| 36. William H. Majory..... | — | 1 | 1 | 1 |
| 37. John Bogardus..... | 1 | 1 | 1 | 1 |
| 38. Joseph Farrington..... | 1 | 1 | 1 | 1 |
| 39. John Valentine, Senr..... | — | — | 1 | — |
| 40. Eli Banks..... | 1 | 1 | 1 | 1 |
| 41. Geo. S. Nafie..... | 1 | 1 | 1 | 1 |
| 42. John Hoagland..... | 1 | 1 | 1 | 1 |
| 43. Abraham Wood..... | 1 | 1 | 1 | 1 |
| 44. John Aikins..... | 1 | 1 | 1 | 1 |
| 2732 45. Henry L. Morgan..... | 1 | 1 | 1 | 1 |
| 46. John M. Hoagland..... | 1 | 1 | 1 | 1 |
| 47. Abraham Berrian..... | 1 | 1 | 1 | 1 |
| 48. Edward Garrison..... | — | — | 1 | 1 |
| 49. Daniel Devoe..... | — | — | 1 | — |
| 50. John Valentine, Junr..... | 1 | 1 | 1 | 1 |
| 51. Charles Wighton..... | 1 | 1 | 1 | 1 |
| 52. Matthias Warner, Junr..... | 1 | 1 | 1 | 1 |
| 53. Wm. G. Ackerman..... | 1 | 1 | 1 | 1 |
| 54. Garret Garrison..... | 1 | 1 | 1 | 1 |
| 2733 55. Dennis G. Marjory..... | 1 | 1 | 1 | 1 |
| 56. William McDermott..... | 1 | 1 | 1 | 1 |
| 57. Peter Garrison..... | 1 | 1 | 1 | 1 |

| | Assem'y. | Judic'y. | State. | School. |
|------------------------------|----------|----------|--------|---------|
| 58. Edwin Forrest..... | 1 | 1 | 1 | 1 |
| 59. William G. Gibson..... | 1 | 1 | 1 | 1 |
| 60. Abraham E. Ackersen..... | 1 | 1 | 1 | 1 |
| 61. Richard Westfield..... | 1 | 1 | 1 | 1 |
| 62. Jacob H. Varian..... | 1 | 1 | 1 | — |
| 63. James Bradley..... | 1 | 1 | 1 | 1 |
| 64. Peter Herring..... | 1 | 1 | 1 | 1 |
| 65. Pembroke Lawrence..... | 1 | 1 | 1 | 1 2734 |
| 66. Oscar Lawrence..... | 1 | 1 | 1 | 1 |
| 67. Thomas Highland..... | 1 | 1 | 1 | 1 |
| 68. Wm. Berrian..... | 1 | 1 | 1 | 1 |
| 69. Harvey D. Dexter | 1 | 1 | 1 | 1 |
| | — | — | — | — |
| | 63 | 64 | 69 | 66 |

Westchester County, Town of Yonkers, ss. :

GEORGE B. ROCKWELL, of the town of Yonkers, in said county, being duly sworn, says: That he is the Clerk of the said town of Yonkers; that he has this day searched the official records of his said office of Town Clerk, and finds there remaining of record, in his said office, an original poll list of the electors who voted in 2734 the said election district of said town of Yonkers, at the election held in said town, on the 6th day of November, 1849; that deponent has carefully compared the preceding copy of said poll list of such voters with the said original poll list on file in his said office of Town Clerk, and the same is a correct and true copy of said original, and of the whole of said original.

GEORGE B. ROCKWELL,

Town Clerk.

Sworn to, this 24th day of Dec., }
1850, before me, }

HENRY W. BASHFORD,

Justice of the Peace.

2736

SUPREME COURT.

CATHARINE N. FORREST

against

EDWIN FORREST.

Westchester County, Town of Yonkers, ss. :

CALEB VAN TASSELL, of the town of Yonkers, in said county, being duly sworn, says : That he was one of the inspectors of the election held in the second district of said town of Yonkers, on the 6th day of November, in the year 1849 ; that this deponent, as such inspector, 2737 attended the said election, and received the ballots of the electors who voted at such election ; and this deponent further saith, that the above named Edwin Forrest, on the said 6th day of November, 1849, in the presence of this deponent, voted at the said election.

And further this deponent saith not.

(Signed)

CALEB VAN TASSELL.

Sworn to, this 25th day of Dec., }
1860, before me, }

JOHN CRISFIELD,

Justice of the Peace.

2738

At a Special Term of the Superior Court of
the city of New York, held at the City
Hall, in the city of New York, on the
twenty-fifth day of June, in the year one
thousand eight hundred and fifty-nine,

Present—The Honorable LEWIS B. WOODRUFF, *Justice*.

CATHARINE N. FORREST,

Plaintiff,

against

EDWIN FORREST,

Defendant.

The defendant having made a motion for leave to 2739
issue a commission in this action to examine witnesses
in his behalf in the State of California, whose names
are set forth in the petition of the defendant read on
said motion, and for further or other relief, and which
motion was heard upon the pleadings, proceedings,
verdict, bill of exceptions and the judgments of the
Special Term and General Term of this court in this ac-
tion, and upon the said petition of the defendant and the
affidavits of William T. Coleman, M. Hall McAllister,
Theodore Payne, William H. Talmage and Theodore
A. Wakeman, on the part of the defendant, and upon 2740
the affidavits of the plaintiff, and Nelson Chase, William
Henry Brown, Henry Sedley, and J. Hall Wilton, and
a printed volume of affidavits in the Supreme Court, on
the part of the plaintiff, such printed volume being
read, notwithstanding the objection of the defendant's
counsel, that the originals would not be admissible on
this motion—Now, on reading and filing said petition
and affidavits on the part of the defendant, and said
affidavits on the part of the plaintiff; and John Van
Busen, Esquire, of counsel for the defendant, having 2741

been heard in support of said motion, and Charles O'Connor, of counsel for the plaintiff, having been heard in opposition thereto, and due deliberation having been thereupon had—It is ordered, that the said motion be, and the same hereby is in all respects denied.

(A Copy.)

GEO. T. MAXWELL,
Clerk.

2742

At a General Term of the Superior Court of the city of New York, held in the City Hall, in the city of New York, on the thirtieth day of August, in the year of our Lord one thousand eight hundred and fifty-nine,

Present—The Honorable JOSEPH S. BOSWORTH, *Chief Justice*, and LEWIS B. WOODRUFF, EDWARD PIERRE-PONT, and JAMES MONCRIEF, *Justices*.

CATHARINE N. FORREST,
Respondent,

against

EDWIN FORREST,
Appellant.

2743

The defendant, Edwin Forrest, having appealed to the General Term of this Court, from an order made in this action at a Special Term thereof, bearing date the 25th day of June, 1859, denying the motion of the defendant for leave to issue a Commission in this action to examine witnesses in his behalf, orally, in the State of California, the names of some of whom are set forth in the petition of the defendant read on said motion; and James T. Brady, Esquire, of counsel for the defendant, 2744 having been heard in support of said appeal, and Charles O'Connor, of counsel for the plaintiff, having been heard

in opposition thereto, and due deliberation having been thereupon had—It is ordered that the said order, so appealed from, be, and the same hereby is in all things affirmed, with ten dollars costs. It is further ordered, that the said defendant pay the said ten dollars costs to the plaintiff or her attorney in this action.

Filed, Nov. 14, 1859.

At a Special Term of the Superior Court of 2745
the city of New York, held at the City
Hall, in said city, on the twenty-second
day of July, one thousand eight hundred
and fifty-nine,

Present—LEWIS B. WOODRUFF, *Justice*.

CATHARINE N. FORREST,

against

EDWIN FORREST.

On reading and filing the petition of the plaintiff, and on reading the printed case on which the defendant's 2746 appeal to the General Term was argued, the order of the General Term thereon, the several papers used on the defendant's motion for a commission to California, decided on the twenty-fifth day of June last, and on reading and filing the affidavit of John Van Buren, Esquire, the affidavit of James M. De Young, and a report or certificate of Alvin C. Bradley, Esquire, Mr. Charles O'Connor having been heard for the plaintiff, and Mr. James T. Brady having been heard for the defendant, it is now ordered that, to enable the plaintiff to 2747 carry on this action, the defendant pay to her use for that purpose, on the tenth day of August next, the sum

of one thousand five hundred dollars, and the further sum of two hundred dollars on the first Monday of each month hereafter, during the pendency of this action, until final judgment shall be given fixing the amount of the permanent allowance for her support.

And it is further ordered, that such payments be respectively made on the respective days above specified, 2748 between the hours of twelve at noon, and one in the afternoon, of such days respectively, at the office of Howland & Chase, Attorneys for the plaintiff in this action, No. 46 Exchange place, in the city of New York, and into the hands of her said attorneys, or one of them, or at the office, for the time being, of her Attorneys of Record for the time being, and into the hands of one of them.

And the defendant having, here in open Court, con- 2749 sented to waive the order of adjournment made in this case by the Referee, and the defendant having produced the consent of the said Referee to continue to act as Referee, dated July 22d, 1859, and the same being filed on the entry of this order: It is further ordered, that the said reference be proceeded in before the said Referee, at his office, No. 74 Wall street, in the city of New York, on the twenty-sixth day of July, instant, at twelve o'clock, at noon, and be thenceforward proceeded in with all convenient speed, and without any unnecessary delay, until such reference be closed.

(A Copy.)

GEO. T. MAXWELL,

2750

Clerk.

SUPERIOR COURT OF THE CITY OF NEW
YORK.

| |
|---|
| CATHARINE N. FORREST,
<i>against</i>
EDWIN FORREST. |
|---|

To the Superior Court:

The subscriber, the referee named in the judgment of this Court, in this cause, the 24th day of July, 1856, respectfully reports :

That he has been attended by the respective parties, and heard their proofs on the matters referred to him in 2751 the said judgment.

That having regard to the circumstances of the parties respectively, the sum of four thousand dollars per annum would be a suitable allowance to the plaintiff, for her support ; that the same should be payable from the 19th day of November, 1850, the day when this suit was commenced, quarterly, on the first days of February, May, August, and November, in each year ; that so much thereof as shall have fallen due, at the time of the decision of the Court on the further hearing of this cause 2752 on this report, be paid within thirty days thereafter, and the residue as it becomes due, to the United States Trust Company, of the city of New York, for the plaintiff's use. That as security for the payment of such allowance, it would be reasonable and proper for the defendant to transfer to the said Trust Company the mortgage executed by the Sisters of Charity of Saint Vincent de Paul, to the defendant, on the Fonhill property (Exhibit No. 19, in Schedule Three, hereto annexed), dated the 20th day of December, 1856, for \$75,000, together 2753 with the bond of the said Sisters of Charity therein described ; that on the punctual payment by the defendant of such allowance, the said Trust Company pay the in-

terest on the said bond and mortgage, to be received by them, to the said defendant or his assigns; but no payment of principal that may be made thereon, to be paid over to the defendant, or his assigns, without the order of this Court. The defendant, however, to be at liberty at any time to apply to this Court, on due cause shown, to change the said security, and to substitute other adequate security therefor.

That having regard to the expenses of the plaintiff, for counsel fees and otherwise, in prosecuting this action, not taxable as costs merely, no part of any moneys paid or allowed by the defendant to the plaintiff since the commencement of this suit, and before the 24th day of July, 1856, should be deducted from the amount of the allowance hereby reported as suitable to be made.

That the facts found by the Referee, with his opinion on the matters aforesaid, are hereto annexed, marked respectively, Schedules One and Two, and that all proofs taken by him are also hereto annexed and marked Schedule Three, wherein also appears any rejection by him of proof offered.

All of which is respectfully submitted.

New York, Dec. 1st, 1859.

A. C. BRADLEY,
Referee.

| | |
|--------------|-------------------------------|
| FORREST | } <i>Schedule Number One.</i> |
| <i>agst.</i> | |
| FORREST. | |

FACTS FOUND BY REFEREE.

At the intermarriage of the defendant and plaintiff in June, 1837, she was aged nineteen years and he thirty-one. Her father was a performer and actor in English Opera, at the Covent Garden and Drury Lane Theatres in

London, having once or twice also visited the United States in that capacity. Her "mother was an exceedingly well brought up lady, the daughter of an officer in the British Army, who was killed in Egypt." The plaintiff herself had been reared in a style of some elegance, was well educated, with a taste for music and the stage, and possessed unusual grace and beauty of person. She brought the defendant no property. 2757

The defendant began life without property also. His occupation or profession was also that of the stage. How successful he had been is undisclosed, except that he had purchased a house and lot on Tenth street, in Philadelphia, in 1827, with his first earnings, worth about \$6,000, and some vacant lots in Cincinnati, in 1834, or '5, costing \$6,000 more. In 1836 he made his first appearance on the London stage, in Shakespeare. Prior to his marriage no accounts of his receipts or expenditures were kept. Such accounts were kept, however, during his cohabitation with the plaintiff, and discontinued immediately afterwards. In November, 1850, about thirteen years and a half after the marriage, the value of his real and personal property (as he admits in his answer in this case) amounted to one hundred and fifty thousand dollars. 2753

How soon after the marriage a domestic establishment was set up, does not appear. They occupied a house owned by the defendant, which was sold in 1856, for \$11,500, after having received repairs to the extent of about \$2,000, and after having increased in fair rental (see Ex. No. 13, Schedule 3), since 1850, some 13 per cent., and which when dwelt in by them was worth only eight or nine thousand dollars. There was allowed to Mrs. Forrest two hundred dollars per annum for her apparel, she not desiring any more. The main feature of the establishment was a private library of from five to ten thousand volumes, but of what nature, value, or cost, is not shown. The furniture seems to have been re- 2759

spectable, and not inappropriate to the house they occupied. The establishment was under the immediate charge of the plaintiff, and appears to have been conducted with system, moderation and economy. The domestics were a man servant, ladies' maid and cook.

The family consisted of the defendant and plaintiff, and at times of one or the other of the plaintiff's two sisters. There were occasional hospitalities to friends. Of the scale of expenditure, prior to 1848, there is little direct evidence that is entitled to reliance, but there is no ground to believe that, exclusive of the house furniture and library, it ever exceeded three or four thousand dollars a year, the sum at about which it then was. This moderation was, however, only preparatory to something far more considerable.

The property called Fonthill, consisting of about fifty acres, and purchased for about \$12,000, was prepared and embellished for a residence at an expenditure of nearly \$80,000, mainly in the erection of a dwelling which witnesses term "The Castle." The unhappy occurrences, however, which resulted in a divorce, interrupted these preparations, and the estate was never occupied by either.

They separated in May or June, 1849. An allowance to her was made at the rate of \$1,500 *per annum*, payable quarterly in advance, commencing about the first of June, 1849 (probably May), and punctually paid to and including the first of November, 1851, when it was discontinued. This suit was commenced the 19th day of November, 1850, and judgment in favor of the plaintiff, dissolving the marriage, was entered the thirty-first day of January, 1852.

The expenses of the plaintiff for counsel fees and otherwise in prosecuting this action, not taxable as costs merely, amount to about seven thousand dollars. The plaintiff's proceedings were stayed on appeal.

The real estate owned by the defendant at the date of

the decree, its value at that time, the income then derived from it, the time when certain portions of it were sold, the prices it brought, the present value and income derived from the residue, are, so far as ascertainable from the evidence, as follows :

2764

| PROPERTY. | Value in 1862. | Income in 1862. | When sold. | At what price. | Present value. | Present income. |
|----------------------|----------------|-----------------|------------|----------------|----------------|-----------------|
| Cheleca..... | \$40,000 | \$3,450 | 1857 | \$49,450 | | |
| Cincinnati..... | 20,000 | 1,500 | | | \$15,000 | \$1,200 |
| New Rochelle..... | 5,000 | 400 | 1856 | 5,000 | | |
| Tenth street, Phila. | 6,000 | none. | 1855 | 6,000 | | |
| Fonthill..... | unkn'wn | none. | 1856 | 95,000 | | |
| Covington..... | unkn'wn | none. | | | 20,000 | none. |
| Yonkers..... | unkn'wn | none. | | | 86,000 | none. |
| | | \$5,350 | | \$155,000 | \$71,000 | |

All this still remains still subject to the plaintiff's inchoate right of dower, except the house and lot on Tenth street, Philadelphia, in which it is probably extinguished by the judicial mode of conveyance adopted.

2765

This was given in part payment for the house and lot corner of Broad and Master streets, Pha., hereafter mentioned.

In the other cases, about twenty-five per cent. (\$38,050 in all) of the purchase money was paid in cash, and bonds and mortgages (\$111,400 in all) taken for the residue, payable, with interest at seven per cent., semi-annually, except the Fonthill mortgage; but in every case it is stipulated that a specific sum, equal to or exceeding one-third of the purchase price, shall, on punctual payment of interest, remain unpaid until the plaintiff's inchoate right of dower shall be extinguished.

2766

The mortgage on Fonthill is for \$75,000, payable in twenty years, with six per cent. interest, reserving \$33,000, or thereabouts, for the same purpose. The property at Yonkers and at Covington is comparatively valueless for agricultural or any other purposes, except for building sites and fancy residences; but the plain-

tiff's inchoate right of dower therein forms an effectua
bar to a sale for such purposes at any reasonable price.

Such personal property as he owned at the date of the
2767 decree, he gave by a formal deed of gift to his three
sisters, or one of them. What it consisted of is un-
known, except his household furniture, an interest in a
vessel called the Edwin Forrest, and the large library
above mentioned.

The value of the furniture is not shown, that of the
library is stated by him to be now \$4,592, and that of
the interest in the Edwin Forrest to be now \$3,500.
What the value of any of this property was at the time
of the transfer, is not disclosed.

The personal property now owned by the defendant,
2768 as admitted by himself, is as follows :

| | |
|--|--------------|
| Books, Pictures and some other personal
property, articles not known..... | \$5,000 00 |
| Stock in Yonkers Bank..... | 1,000 00 |
| Maurice's Bonds..... | 15,000 00 |
| Butler House..... | 1,000 00 |
| Arch street Theatre..... | 300 00 |
| Money in Bank..... | 2,550 00 |
| Mortgages on real property sold..... | 111,400 00 |
| | <hr/> |
| | \$136,250 00 |

The property purchased by the defendant in the name
of his sisters, or some of them, since the date of the
2769 decree and the prices paid therefor, are as follows :

| PROPERTY. | PRICE. |
|---|-------------|
| Small lot in Yonkers..... | \$400 00 |
| 87 and 89 Thompson street, New York.... | 8,500 00 |
| 9 acres at Yonkers..... | 6,000 00 |
| Lot "in the fields," Pha..... | 400 00 |
| Lot, corner Broad and Master street, Pha.,
his dwelling..... | 33,088 00 |
| Lot adjoining same..... | 5,000 00 |
| | <hr/> |
| | \$53,380 00 |

His sisters, who are without means other than what the defendant's bounty may have bestowed on them, paid, neither directly nor indirectly, any value for the property or any part of it, nor was he indebted to either 2770 of them in any sum whatever. The purchases were made with his own property, and the conveyances made to them for purposes undisclosed by the proofs, and left only to conjecture. The buildings 37 and 39 Thompson street yield income (amount not stated), which is received by the defendant. The house at the corner of Broad and Masters streets, Pha., is a fine, spacious three-story brick, with stone front, dwelling, occupied by the defendant, with his sisters. The library and furniture, alleged to have been given them, are there also. Other furniture has been added at the defendant's 2771 expense. All this property as well as all the rest, that purported to have been given to his sisters, remains subject to the control and disposal of the defendant, and is held for him on secret trust, and remains and is his own still.

The aggregate present value of the entire property of the defendant, not including the household furniture, disclosed in this investigation, and above mentioned, is \$268,722.

One of his sisters is aged about forty years, and the other two are older than himself.

During the six years next after the judgment in this 2772 cause, the defendant continued to pursue his profession, performing engagements in New York, Boston, Providence, Philadelphia, Baltimore, and St. Louis; but what sums he received therefor are not known, except that for the period between the 10th of February, 1852, and the 6th of March, 1857, the Broadway Theatre of New York alone paid him, on an average, about \$14,000 per annum, being for the whole period \$72,394.⁶⁴/₁₀₀, and the proceeds of the other engage-

ments must have been large. The disposition made of
2773 such moneys is unknown.

Both the plaintiff and defendant are without issue.

Since the judgment in this cause, the plaintiff has given concerts in Providence, Rhode Island, and has been a manager and performer at one of the theatres in San Francisco ; but how long she continued in either place, or in either capacity, does not appear, nor what income she received.

SCHEDULE NUMBER THREE.

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| FORREST | } |
| <i>agst.</i> | |
| FORREST. | |

2774 Mr. C. O'CONOR and Mr. N. CHASE *for Plaintiff.*

Mr. J. T. BRADY and Mr. JOHN VAN BUREN *for Defendant.*

REFEREE'S OPINION.

It was contended, on behalf of the defendant, that even if any allowance at all is to be made (for even this was denied), it should be limited in amount to such a sum as would enable Mrs. Forrest to maintain herself alone as a single woman—that at her period of life she should board in some respectable private house or hotel ; that for this, \$1,200 a year would be ample ; or, if the allowance be made on the principle of her keeping house, it should not exceed \$2,000 a year.

2775 That the value of the defendant's property should be considered only so far as to ascertain whether his means would enable him to pay the amount awarded on the principle above stated ; that any inquiry into this value should be limited to the date of the divorce ; that if the allowance should be in reference to his property, it

should be in proportion to his income alone ; should commence not earlier than the date of the decree, and should terminate if she marry again. For the plaintiff, on the other hand, it was claimed that, although the position, education, and tastes of the plaintiff were to be considered, yet the allowance should be mainly determined by the pecuniary ability of the defendant ; 2776 that his property consisted chiefly of the joint accumulations of himself and the plaintiff, and that the allowance should be larger on that account ; that it should be proportioned, not to the actual income, but to the full value, if that value were turned into cash and invested at interest ; that such allowance should equal the full one-half of the income which would thus be produced ; that it should commence with the commencement of the suit, and continue unchangeable until terminated by the death of one of the parties. But the plaintiff's counsel expressly declined to express any 2777 opinion at the period at which the valuation should be taken, whether as of the date of the judgment or of the reference.

At law a wife becomes entitled, by the mere fact of marriage, to a suitable maintenance at the hands of her husband for the period of their joint lives. But though, if she be the survivor, this right to a maintenance terminates at his death, yet a sort of substitute is provided for it by her dower, and a succession to a distributive share of his unbequeathed personalty. These three rights are all the provision made by law for her subsistence while she shall live, and to these three she becomes 2778 entitled at the altar ; the first to be enjoyed in her present character of wife, and the other two in her future character of widow, which is only that of a wife outliving her husband.

Now, the statute which governs on the present occasion is to the effect, that if the wife be complainant, and a decree dissolving the marriage be pronounced, the

Court may make a further decree or order against the defendant, compelling him to provide such suitable allowance to the complainant for her support as the Court shall deem just, having regard to the circumstances of the parties respectively. And it becomes important to determine whether the support which the Court thus acquires jurisdiction to enforce be the old common law right to a suitable maintenance above mentioned, or only a new statutory right erected on its ruins. For, obviously, if it be the former, then the nature and extent of this allowance, as well as the period at which it shall commence, and to which it shall extend, are all to be governed by the principles of the common law, except only as they may be modified in their application by the altered personal relations of the parties.

But if this support be nothing but a new statutory right, beginning only after the other has ended, and after all the principles by which that other was regulated have ceased to apply, then, inasmuch as the statute gives no directions, all would be left to mere discretion.

It is true that, in either case, there would be a wide discretion to be exercised; but in the former it would be guided by principles, familiar, generally known, and of easy application, while in the latter there would be no guide but the mere private sense of justice, not of the Court, but of the individuals who for the time being happened to exercise its functions.

What, then, is a marriage dissolved? What does a decree dissolving a marriage accomplish? In which of its numerous significations is that word employed, when thus applied? Sometimes it means to annul—but a marriage dissolved is far less than a marriage annulled. Another sense is, to separate; but a judicial dissolution is considerably more, at least as to one of the parties, than a judicial separation—other senses are, to loose, to melt, to disunite, to untie, to remove, to *explain*. None of these or its other significations describe that anomaly

lous position towards each other, and towards society, of a man and woman, by one of whom a divorce has been obtained against the other for adultery. Before the statute, that anomalous position had never existed, and of course never had any technical name. The divorce *a vinculo* annulled the marriage, and left every thing void from the beginning. The divorce from bed and board separated the parties, but left the tie between them in force to the end. Justice and policy required an intermediate kind, less defective than the latter, less 2783 sweeping than the former, and the result is set down in the statute. The details are there, as well as the principle they are intended to carry out. And whether that result be called dissolving the marriage, or modifying it, or (what would perhaps be more accurate than either) releasing one party from it for the adultery of the other, the meaning of the term would be only such as the context showed it to possess.

For, the thing itself being new, it must necessarily be designated, if designated at all, either by a new term, made expressly for the purpose, or by an old term employed with a new signification. The meaning of either 2784 would be the same, and would be exactly the effect which the statute, by all its provisions taken together, as the different syllables of one word, intended to produce.

Exactly *what*, then, is that effect? If the divorce be obtained by the husband, he may marry again—a marital disability removed. She may not marry again—a marital disability continued. She loses her maintenance, her dower, and her distributive share in his personalty—three marital rights forfeited. And finally, his right to any real estate owned by her, *at the time of pronouncing* 2785 *the decree*, in her own right, and to the rents and profits thereof, is not taken away or impaired, and he is also entitled to such personal estate and things in action as may belong to her, or be in her possession at the time

of such decree, the same as though the marriage had continued, his existing marital rights of property continue. Thus it will be seen that the effect of the divorce is simply, that he is released from all his matrimonial duties to her, but retains all his matrimonial rights against her, consistent with her separation from him, except only, by implication, his rights to her future acquisitions ; for, 2786 had he been allowed to retain his rights to these, she would have been driven forth to live by charity or shame, or else to starve. Thus, so far from the marriage being wholly terminated, many of its most important incidents on both sides are left in force. It is true that cohabitation is at an end, but cohabitation is no *necessary* part of matrimony. The parties may separate at the altar, never meet again, and the marriage remain unimpaired until death.

Then, on the other hand, on the wife obtaining a divorce, she may marry again—he may not. No implication excludes her from marital rights in his future ac- 2787 quisitions, any more than from his past, because no such necessity to save him from charity, shame, or starvation, exists. Besides, the express forfeiture of her dower and distributive share of his personalty, occasioned by *her* conviction of adultery, affords the strongest of all possible implications that no such result ensues on his conviction of that offence. Notwithstanding that there has been a decree, dissolving, as it is called, the marriage, it is certain that she remains so far his wife as to become, if she survive him, his widow, and in that character to obtain her dower; and it is hard to see why, if she be his wife and widow to that extent, she is 2788 not also wife and widow to take out, in the latter character, administration, and to appropriate to her own use her distributive share of his effects. It is, moreover, certain that she has now, as she had before the suit for divorce was commenced, a right to a suitable support. Then, besides the irresistible implication from her pos-

session of all these rights which none but wives enjoy, that he must all the while hold the correlative character of husband, there is this also. If *he* marry again, though such marriage would be absolutely void, yet no sentence of nullity could be pronounced, except on the ground 2789 that his "former wife was living," and that his marriage with her "was then in force." And notwithstanding the case of *The People v. Hovey* (5 Barb. 117), such second nuptials would be bigamy, he having a "wife living" with whom there was a marriage which had been dissolved for no cause other than *his* adultery. 2 R. S. 687, § 89, subd. 3. Revisers' notes. 3 R. S. § 25, 2d ed., §§ 8, 9. 1 R. L. 112, 2d ed., 198, s. 4. See also *Wait v. Wait*, 1 Comst. 95.

From all these considerations it is apparent that the aim of the Statute of Divorce was, to enable the wife in 2790 this case (as the husband in the other) to do *that*, with the sanction of the Court, which, in most contracts, persons may do without such sanction—refuse further performance of an agreement which the other party had in essential particulars violated, and yet insist on her rights under it, and hold him to his obligations. Those rights are her rights, as a wife; those obligations are his obligations, as a husband: both date from the act of marriage, and both survive what is called its dissolution.

Undoubtedly there may be anomalies in this way of considering the subject, but the whole law of divorce is fruitful of such. What more anomalous than that state 2791 produced by every decree of separation—"The undefined relation of a wife without a husband, and a husband without a wife;" or than that, from a marriage expressly forbidden and pronounced absolutely void, there should be born children, *half* legitimate, lawfully begotten as to one parent, and bastards as to the other? Or yet, than that other, stranger still, where issue of a marriage, contracted after a divorce, valid in one coun-

2792 try but void in another, would, owing to the different laws of the domicil and the *rei sita*, be held, in the same Court, " Legitimate, as to the real estate, and illegitimate, as to the personal ; legitimate, as to the mill, illegitimate as to the machinery ; born in lawful wedlock, as to the barn, but a bastard as to the grain in it."

After all, the paradox of permitting a woman, already the wife of one husband, to marry another, is rather verbal than real. It is only as to property, and to the incapacity of the guilty party to contract new nuptials, that any of the relations of marriage continue ; as to person, they are altogether ended.

2793 The support, then, mentioned in the Statute being nothing but the wife's common law maintenance saved from the divorce, it follows that it is a right no more within the discretion of the Court to withhold than any other right conferred by contract or by law.

The *permissive* phrase adopted by the Statute imports not discretion but jurisdiction. Questions of divorce and of the wife's maintenance, as connected with them, are foreign to the original functions of the Court of Chancery. That omission the Statutes supply, and they do it in this case, as in others, by enabling words. Thus, the Chancellor may, by sentence of nullity, declare void the marriage contract. Divorces *may* be granted and 2794 marriages dissolved by the Court of Chancery. A separation from bed and board *may* be decreed. The Court shall have *power* to decree a sale of mortgaged premises. The Court (of Errors) shall have *full power* to correct and redress all errors, &c. In other cases, the Legislature confers " authority" or " jurisdiction ;" but the duty of exercising it arises only when the suitor comes with a case falling within its limits, then the Court has no more discretion to deny justice than to sell it.

What maintenance shall be deemed suitable, the law has never defined, but has left it wholly to depend 2795 upon the circumstances of each particular case. These,

hers and his, are the measure of the right the wife acquires, when she assumes that character. And when a husband has furnished the support which his and her circumstances demand, he has faithfully discharged all that portion of his obligations. These circumstances are the same in no two families, nor in the same family in any two years. They differ, in early, from middle life, and in old age from both. They vary, also, with wealth, with tastes, with education, with distinction, with localities, with intellect, with morals. As these 2796 circumstances, which are the measure of the suitable support, vary from time to time, so that support or maintenance varies along with them. One sort is suitable for the young bride, another for the aged matron; one sort, while the husband is struggling in poverty and obscurity—another when the battle for position in the world is over, and the trophies are wealth and fame.

Happily, however, for society, most husbands and wives pass along amid the charities of home and family, unconsciously moulding themselves to the requirements of these intricate and ever-shifting circumstances, giving 2797 and receiving the maintenance suitable to their condition, wholly indifferent whether there be any law on the subject. But if the question, whether what she receives be suitable, ever arises, she is not the judge: that jurisdiction belongs, in the first instance, to the husband. Sometimes it comes before a jury on a question of necessities, sometimes before the Court on a question of separation granted or refused for his cruelty or desertion, or of divorce for his adultery. Of these, the husband best understands what those circumstances are, because, to a great extent, he has made them. Within certain limits, he sets the 2798 example which is to serve the others for a rule. Extravagance or parsimony may characterize the suitable maintenance which he "deems to be just." These, neither Court nor jury would imitate. But where he has initiated a course of expenditure suitable to his wealth, to

his position in society, and to hers also, if this course have been so long continued that her habits have moulded themselves to it, and her expectations justly look for its continuance, he has furnished a rule, the application of 2799 which can never, while circumstances remain unchanged, be unjust either to him or to her. Food, raiment, and shelter do not, in all, or even in many cases, constitute support. The kind of house, the style of furniture, the hospitalities given and received, the associations of every kind, all these, and many other elements, combine to determine the position which a family occupies in the gradations of society. This position once occupied, then all things whatsoever are requisite, in order to keep it, become thenceforth necessities : for less than this would 2800 cause social degradation, and social, like all other degradations, are, except for just cause, always unjust.

It is true that no court can apply this rule to its full extent. For much that enters into the notion of a wife's situation at her husband's board and home, her support and maintenance there, her enjoyment and comfort, is totally lost by reason of the adultery, and no compensation can be given.

In an action by the husband against the seducer of his wife, there is regard, and compensation too, for the loss 2801 of her affections, endearments and society, for hopes blighted, and a home made desolate. Nothing of the sort, however, can be regarded here. Though a husband's affections, endearments and society have been lost, though hopes, no matter how warm and high, have been disappointed, though a home, no matter how loved, has been, not indeed made desolate, but too often, after youth and beauty and health are gone, has been wrested away, yet the law recognizes in her no other right from all this, but to be supported still ; supported, as far as practicable, in the way and according to the scale she had been and would have continued to be, if the husband 2802 had kept his vow. He has expelled her from the

home where she had a right to dwell ; she is entitled to another equally good. He has excluded her from society at his side ; she is entitled to the means, if his are adequate, of maintaining herself in a rank equally high. But it is to be remembered that the right acquired by the wife, at the marriage, to a suitable maintenance for the period of their joint lives, is not to be so construed as to deprive the husband of *his* substance. Considering his property as a fund, neither has a right to live from it to the exclusion of the other. They must share, no 2803 matter how small, his estate or income, and where to his adultery he has added the most brutal cruelty, and the most shameless profligacy, even to making his own house a brothel, the law gives alimony, never beyond one-half of the annual value. Although some increase of allowance for aggravated misconduct on the part of the husband, or some diminution for similar conduct on the part of the wife, is always, for the wisest of reasons, made by the Court, yet her right in the fund is made no greater by the adultery, nor his any less.

The law seeks to give her the maintenance to which, 2804 without that offence, she would have been entitled, and it seeks, also, to compel him to give it.

As to this right and duty, it has already been shown, that they remain undivorced. It continues on after the judgment, subject to the same fluctuations that were inherent in its nature before. And chief of these is the variations of the husband's circumstances ; else, if his circumstances at the date of the judgment were alone to be regarded, and an allowance once made, suitable to them, was for ever unchangeable, it would happen that a reduction of the annual value of his property or income by one-half would at once give her the whole, 2805 and in certain cases, as where it is derived from salary, or personal services, reduce him to charity or starvation. Greater depreciations than his are not uncommon. On the other hand, the annual value may increase many

fold beyond what it was at the divorce, and thus she would be left with a support less by one-half, or three-fourths, or by a much greater proportion, than if he had remained faithful to his vow, or even than if he had committed only the minor offences of desertion or cruelty, or yet, than, though he had even committed adultery, the wife had chosen to submit in humiliation to her wrongs, rather than apply to the Court for justice. Undoubtedly, the statute, by authorizing the Court, if it shall deem fit, to exact security, in order to protect the wife against any indisposition of the husband to make the required payments, contemplates a certain degree of permanence. But, then, this statute applies as well to allowances after a separation decreed for cruelty or desertion, or even where such decree has been refused, as to allowances after his divorce for adultery; and the permanence of the allowance, inferrable from this provision, is therefore no greater in the latter case than in the two former, and the remedies for the non-payment are the same in all three. Of course, slight, unsubstantial variations would not be regarded. But nothing in the terms or policy of the statute imports unchangeableness in any of them. In all three cases, jurisdiction to compel the allowance is conferred, though in three several sections; yet in substantially the same words. For, although the Court is, in cases of adultery, expressly instructed to have regard to the circumstances of the parties, respectively, yet the same is implied in the other two sections, unless, indeed, these latter are to be construed to provide for an allowance, such as the Court should think just and proper, *without any regard to the circumstances of the parties*. Since, therefore, jurisdiction to make the allowance, in all three cases, is conferred in words of the same import, since the provisions for security and for enforcing the payment are identical in all, and since the wife's support, which these allowances are intended to provide, was the same in its nature and its origin, it seems hard-

ly open to question, that they are the same in this also—that the support to be received by her is to be determined by the circumstances of the parties, respectively, as they existed, not at the date of the judgment, but, at the time when the investigation is made, how long soever afterwards this may take place, and however many other investigations may have preceded it, provided considerable changes of circumstances have intervened. Prosperity continues, after the divorce as well as before, to furnish one measure of support for the wife, and adversity another.

Although a husband's wealth must certainly be looked to, in order to determine his ability to pay the allowance—for none can be made beyond the half of the annual value—yet it is difficult to say that his wealth is not also to be regarded in determining what amount is suitable. Undoubtedly, the amount should be such as would naturally be consumed by the necessities appropriate to her position and his own. The object is support, not accumulation; to maintain, and not to enrich. Now, what are luxuries improper for persons in one condition, become mere necessities to those of another. The jewelry which was improper for the wife of a SOLICITOR would be indispensable to the wife of a PEER. So throughout. A room, furniture and clothing to match, in the attic of a tenement-house, which would be all that one man's wife might reasonably expect, even though educated in refinement and luxury, such are the vicissitudes of fortune, would, if forced by another on his wife, justify the Court in interposing with a decree of separation forever. Now, it is utterly impossible to determine to which, or whether to either of three classes, a wife may belong, without knowing beforehand the husband's responsibility. The chance of the peeress would be at least equal for the attic. Unless some amount of property be assumed, the allowance is to be merely nominal. If the annual value be but five

hundred dollars, then the allowance could not in any event exceed two hundred and fifty. Indeed, it seems hardly possible to stir a step towards what is a suitable allowance without first ascertaining the husband's ability. In a majority of the cases reported, the Courts seem to have inquired into little else than this, except
 2813 the number of children, and the good or ill conduct of the plaintiff and defendant on points collateral to the accusation, but yet connected with it, or its results.

It can matter nothing to know the history of the parties, their education, tastes, manner of living, style of expenditure, of rank in society, unless there be also known, how far the husband's wealth may allow all this to be continued. For, if he have lived beyond his means, or his means have been suddenly abridged, there must be a curtailment all around. So, on the other hand, though he have kept within his income, nevertheless, if his style of living, both for himself and his wife, have borne a cer-
 2814 tain ratio to it, enlarging as it enlarged, and making constant preparations for still further enlargement, his property justifying it, then it might become the duty of the Court, on finding that since the separation his wealth had largely increased, to make an increase of allowance based wholly on such accession of income. In truth, it is hardly possible to conceive a case where it is practicable to determine what is a suitable allowance for a wife, without referring to the husband's wealth for purposes other than to determine his ability pay it.

Whether the allowance is to be based on income alone, depends on the circumstances of each case. It
 2815 will certainly not be contended, that a husband, by merely investing his property where no income is yielded, or in the name of other parties, can avoid or diminish alimony.

Nor, on the other hand, would it be much less unjust, if, at the time of the divorce, that property happened to be invested in real estate, wholly unproductive, and

yet unsalable by reason of the wife's inchoate right of dower in it, to omit that fact from consideration, along with the other circumstances of the case.

The best, if not the only guide to the value of property 2816 is, what it will bring, and if, by reason of incumbrances or other defects of title, property be unsalable, and unproductive besides, it by no means ought to be estimated as of the value it would have, with those defects or incumbrances removed.

Having regard, then, to the circumstances of these parties at the present time, and keeping in mind, not only the sort of maintenance which the plaintiff had received during the cohabitation, but also the expectations justly inspired by the purchase and erection of Fonthill as a future residence, and the more elevated social rank intended thereby to be obtained; and consider- 2817 ing further, that although the unhappy events, which caused the separation, prevented the accomplishment of this purpose, yet the defendant has since the divorce carried out in part the same purpose, by the purchase of his present residence, which, though two-thirds less valuable than Fonthill, is yet three times more valuable than the dwelling which they occupied in New York; having regard to all these, the sum of \$4,000 will be such a suitable allowance to her annually, for her support, as is just. Indeed, \$4,000 will be hardly adequate to furnish her a home, and the enjoyments 2818 thereof, like those which she possessed in New York, and wholly inadequate to furnish them, like those which the amplitude of his wealth justifies Mr. Forrest in enjoying in Philadelphia.

When, twenty-two years ago, in London, Mr. and Mrs. Forrest united their fortunes, he gave her to understand, in the most solemn form, that where he went she might go, that where he lodged she might lodge, that his people should be her people, that what he should acquire she should share;

and that where he died, she might die and there be buried. The union was auspicious. Though his fame was rising, his fortune was low; but what a wife might
 2819 reasonably do, she seems to have done. She presided at his board. She appears to have kept a system and order in his household; but, whatever may have been her agency, he prospered. The fortune, which at his marriage was but \$12,000, became in thirteen years \$150,000. And although, since the divorce, his wealth has reached near double that amount, yet this is mainly attributable to increase of value and fortunate sales of the property already acquired, because, of the annual income of more than \$20,000 received during nearly the whole period since the divorce (\$14,000 from his profession, and six to nine thousand, the income of
 2820 accumulations made during the marriage), nearly every thing has vanished, so that he can account for no part of it. In all this prosperity, it was just that she should have shared. The rank, the position in society, the consideration, as well as the enjoyments of an appropriate home—all of which enter the idea of a wife's proper maintenance—belonged in part to her, and these she would have continued to enjoy.

But, by the judgment of the Court, the grounds of which cannot here be even looked into, much less reviewed, has been such as to render it unfit that she
 2821 should consort with him longer. By this, her rights as a wife are unaffected, while his as a husband are lost. Her obligations as a wife disappear, while his as a husband remain. And paramount among these is the duty of yielding her a support, equal to that she would have been entitled to if his own conduct had been stainless. She should be no loser by his guilt.

One circumstance, however, justly diminishes the allowance from what it ought otherwise to have been. His mother and his three sisters, as well as himself, were all poor. They relied upon his filial and fraternal

affections and unaided exertions for support, and seem 2822 not to have relied in vain. That this was so, the plaintiff must have known at the marriage, and must be deemed to have concurred in its propriety. The mother lived long enough to witness the distinction of her son, and to partake largely of his prosperity. She died in 1847. The sisters still survive. At the divorce they continued dependent on him for support, and are so still, except so far as that dependence may have been removed by his bounty.

The allowance should begin at the commencement of the suit—1st, because the adjudged cases are so ; 2d, because at that time the jurisdiction of the husband, to determine what suitable maintenance for the wife was 2823 just, terminated, and that of the Court began ; and 3d, because the heavy expenses rendered indispensable for her to incur, by his resistance to the relief she was entitled to, were enough to absorb, during the time it continued, not only the sum hereby awarded, but also the other allowance made to her by the defendant under the understanding at their separation.

It being the duty of the husband suitably to maintain his wife during the period of their joint lives, no provision can now be made to terminate the allowance earlier than the period prescribed by law. If the plaintiff should marry again, it will be the exercise of a lawful 2824 right. To create this right, or, rather, to remove all incapacity for its exercise, was a main motive of the statute. If it had been the intention that the right to a support and that of marrying again should be repugnant, some provision to that effect would have been inserted. It is nothing to him, if she again marry. He has lost all rights over her person or conduct. And though by second nuptials she may in some way improve the happiness of her situation, even though she should thereby become entitled to a double maintenance, this would be her good, and not his evil fortune. He can have no 2825

- more interest in her acquisitions, subsequent to the divorce, when they come by marriage, than when they come by exertions of the needle, or the pen, from the concert or the theatre, or by devise or inheritance. He has no interest in them at all. And though it might thus happen, that no part of the allowance received from him be in fact applied to her maintenance, yet he cannot justly complain. The law secures to the wife a sum equal to her suitable support. She has a right thus to use ; still she has an option. If, by curtailing
- 2826 some luxuries, or even dispensing with some necessities, anything be saved for charity, for affection, for gratitude, or even for accumulation, and thereby lawful ends, otherwise beyond her reach, be attained, she sacrifices not her husband's wealth, but her own enjoyments. So, if from any other source, as by her own industry, by marriage, or from affection of the dead, she be enabled not to forego those enjoyments, and yet to save her whole allowance for any or all of these purposes, he suffers no wrong. The allowance, once fixed, becomes a
- 2827 mere sum in gross, payable at stated periods, and to be employed by the recipient at pleasure. In a word, it becomes a debt—he a debtor, and she a creditor. And the plea that the creditor has money enough already might be interposed as a bar by any other debtor as well as by him. At any rate, if a remarriage ought in any respect to modify the allowance hereby awarded, the proper time to consider it will be when that event shall have occurred, and the circumstances of the case be understood. And, for an application in all such cases, the judgment heretofore pronounced makes just and lawful provision.
- 2828 The defendant avows that, by reason of the decision arrived at by the Court and jury in this case, he has become indifferent or reckless of all the goods of this world, except for his sisters. This is in part confirmed by the amounts and heavy transfers of property to, or

purchases made for, them since the decree. It is highly proper, therefore, that ample security be required for the punctual payment of any allowance which the Court shall deem just.

Notwithstanding the novelty of some, the extreme 2829 difficulty of more, and the importance of all the questions which it has thus become a duty to examine, the same amount of care has been employed in their consideration as if any weight had belonged to the opinion now submitted.

The aim has been to apply principles which, while they are just in this case, would be unjust in no other. A doctrine which might tempt wives to the neglect of conjugal duties, in hope of the enhanced rank which a divorce thereby, however remotely occasioned, might bring, would be as much to be deplored as that opposite 2830 doctrine, which would spur on the ill-regulated passions of husbands by motives of economy in the indulgence.

The purpose has been to avoid them both, but with what success or failure is now submitted to the Court, in obedience to whose order alone the examination has been made.

SUPERIOR COURT.

FORREST

agst.

FORREST.

} June 9, 1859.

O'CONOR & CHASE, *for Plaintiff.*

VAN BUREN, *for Defendant.*

2831

Mr. O'C. refers to pleadings for admissions of property.

8 Clause of complaint, fol. 26.

9 Clause also.

Answer, fol. 55.

Mr. O'C. admits that 54 instead of 74 is the true quantity of Fonthill.

Plaintiff offers in evidence deed from S. E. Johnson, Master in Chancery, to defendant, 5th May, 1847, of Fonthill property, No. 1.

Deed from defendant to Sisters of Charity of St. Vincent de Paul, of Fonthill property, 20th Dec., 1856, for \$100,000. Objected to.

2832 Plaintiff says he offered it to prove, 1st, the value of property, and 2d, the receipt of that sum for it.

Evidence received, No. 2.

Deed, dated 14th August, 1849, from Jas. Valentine and wife, and James L. Valentine, to defendant, for 23 acres $\frac{1}{8}$ adjoining Fonthill. Exemplified 7th June, 1859. The exemplification of original deed recorded in Lib. 136, p. 430, Westchester Co. Clerk's office. No. 3.

JAMES L. VALENTINE, *for plaintiff* :

I reside in Yonkers, Westchester county ; I am a farmer.

Q. Did you sell to the defendant a piece of land, amounting to between 23 and 24 acres, adjoining his Fonthill property ?

2833 A. My father and myself did ; we made the conveyance ; his name was James Valentine ; I reside adjoining that property ; have done so 25 or 26 years, but I am not positive.

Q. What is, at this time, the fair market value of that property an acre ?

A. There has been nothing sold around there recently, and there don't appear to be any thing selling at present.

Q. Do you mean to say that you can't give its fair value ?

A. I do not think I can say what it would fetch.

The witness adds, " The assessors have valued it at \$8,000."

This answer objected to by plaintiff's counsel, as not responsive, as being the contents of some written document, not produced, and as not being competent evidence. Objection sustained. 2834

Plaintiff also objects to this answer being taken down in the way it has been done above. Objection overruled.

Cross-examination :

I own property in the neighborhood adjoining this property ; it is $16\frac{1}{2}$ miles from New York ; it has not been cultivated at all this last two years ; it has grass and pasture on it.

Q. What is it worth for farming purposes ?

Objected to ; overruled.

A. I do not think it is worth one hundred dollars an acre for farming purposes. 2835

Q. Does it yield any revenue ?

A. I believe it yielded just enough last year to pay the Yonkers tax—some 60 or 70 dollars ; and there was some little pasture on it.

Re-direct :

Q. What did you and your father sell it for to Mr. Forrest in 1849 ?

A. I think it was \$9,000.

JAMES L. VALENTINE.

CALEB S. MARSHALL, *for plaintiff :*

I reside in New York ; I am President of the American Guano Company.

Q. Do you know the defendant in this cause ?

A. Yes, sir ; I have known him about ten years. 2836

Q. Were you connected with the Broadway Theatre in the year 1852 and for some years subsequently ?

A. I do not remember the year I came to New York, whether 1852 or 1853 ; I was connected with it from about 1852 or 1853, until its close about 1858 ; I was the agent of E. A. Marshall, my brother, the proprietor.

Q. Was Mr. Forrest frequently a performer on the stage in the theatrical representations had in that theatre during that time ?

A. He was.

Q. Who collected the receipts of that theatre and paid the performers during that period ?

2837 A. The treasurer, Philip Warren ; he is here present now in the referee's office.

Q. Were books of account kept in the said theatre by the treasurer ?

A. Yes, sir.

Q. In whose possession and custody are those books ?

A. They are in mine.

Q. Have you got those books here present ?

A. No, sir.

Q. Were you not served with a subpoena in this cause, requiring you to produce them ?

A. I was.

Q. Why have you not complied with the command of that subpoena ?

A. They are not my property, and I did not consider that I had any right to use them for any purpose other than that for which they were left with me to settle the business ; I have been sick to-day, and not able to con-
2838 sult counsel as to my duty, and am sick now ; besides, they are where I could not have got them in time for this meeting, if I had wanted to ; they are the private property of my brother.

Q. If afforded a convenient time to produce them at a future meeting, will you produce and exhibit the entries therein, showing payments to Edwin Forrest of the moneys accruing to him for his professional services ?

Objected to ; overruled.

A. If I am compelled by an order of the Court, I shall do it ; but unless I am commanded by the Court,
2839 or advised by counsel that it is my duty to do so,

I shall decline to do it ; my brother resides in Philadelphia.

Plaintiff moves that the Referee order and direct the witness to produce the books referred to in the subpoena served upon him, being the books of account mentioned in his examination, or exhibit the entries therein, showing the payment, to Edwin Forrest, of moneys accruing to him for his professional services.

Question reserved.

Q. Will you please to produce the subpoena *duces tecum*, which was served upon you ?

A. It is produced and numbered No. 4.

Q. Have you read that subpoena ? 2840

A. I have.

Q. Are the books and papers therein mentioned and belonging to Mr. Marshall, your brother, as lessee and manager of the Broadway Theatre during the period of your connection therewith, in your possession and custody ?

A. Yes, sir.

Cross-examination :

I got this subpoena yesterday.

Q. Have you, since that time, looked for the receipt book, loose receipts, vouchers, drafts, and orders mentioned in the subpoena ?

A. No, sir ; I have not.

Q. How do you know that they are in your possession and control ? 2841

A. I don't know, positively, that they are ; I presume that they are ; I boxed them up, and have occasionally had them since ; I presume they are as I left them ; I told the gentleman who served the subpoena that I should not produce them—first, because I could not, and secondly, I was not disposed to.

Q. For what purpose were they left with you ?

A. For the settlement of my brother's business ; I

have, every week or two, occasion to refer to some one of them.

Q. Are you at liberty to produce them in Court without his consent?

2842 A. I do not think that I am, unless compelled to, any more than to use any of his other property.

C. S. MARSHALL.

The Referee directs the witness to produce the books and papers mentioned in the subpoena, and now in his possession and control, to be produced here next Monday, at 4 P. M. (13 June).

PHILIP WARREN, *for plaintiff*:

I reside in New York; I was Treasurer and Book-keeper of the Broadway Theatre from about 1849 to 1858; I collected the money of the Theatre, and made the payments to the performers; defendant was a frequent performer there during that period; I made the
2843 payments to him for his professional services; it was not my practice to take receipts from him; we paid him by checks to his order; I drew and signed the checks; I kept a check-book; I noted on the margin of the check-book each check issued to him; some were on Clarke, Dodge & Company, and some on the Broadway Bank, the bankers for the Theatre; besides this, we had a debtor and creditor account with Mr. Forrest, in the ledger; I have not the slightest idea where those check-books, ledgers, and checks are.

Q. About how much money did you thus pay to Mr. Forrest, after the fall of February, 1852?

A. I have not the slightest idea.

Q. Did you, or not, from time to time after that date,
2844 make him many large payments?

Objected to; overruled.

A. Whatever Mr. Forrest was entitled to he received; I don't know what you consider large payments; some would consider \$5 large, other \$50,000; we made him

during that time many payments; I have not the slightest idea what sum we paid him during that time.

Q. State, according to the best of your recollection, about how much you paid him for any engagement in the year 1852?

A. Either that, or any other year, I can give you no 2845 idea of the amount for the year, or any one engagement, without reference to the books of the Theatre; our checks were drawn upon no other bank or banks except those two.

P. WARREN.

SUPERIOR COURT.

CATHARINE N. FORREST

vs.

EDWIN FORREST.

Referee's minutes, June 13, 1859.

Plaintiff gives in evidence an exemplification of the 2846 Register of New York. Deed, Edwin Forrest to Forrest Beals, dated March 8, 1856. Consid. \$14,100, brick dwelling-house and lot of land, north side 21st st., between 9th and 10th avenues. No. 273 West. Also 2 lots on the northerly side 21st street, known as 275 and 277 West. Record. Mar. 17, '56. No. 5.

Defendant's counsel objects to the introduction of any proof of property acquired or moneys received by defendant subsequent to the date of the judgment 31st January, 1852.

The defendant renews this objection to the like evidence in each year prior to May, 1859, when notice was served by plaintiff on defendant of intention to proceed 2847 with this reference.

Objection overruled.

CALEB S. MARSHALL, *recalled for plaintiff*:

I have been confined to my bed until about noon to-day, and was unable to get access to the books until about that time; they are very numerous and cumbersome; I found an abstract of the whole account of Mr. Forrest with the Broadway Theatre; it is made by the treasurer; I brought that along, thinking that it might answer the purpose, and I now produce it.

Q. In the years 1851, and 1852, and 1853, and 1854,
2848 and 1855, do you know from Mr. Forrest's own statements whether he performed upon the stage in any other places besides New York?

A. I could not say that I do, although he may have told me so; I don't remember whether he did or not; my memory is not sufficiently good to justify me in swearing that he said any thing in my hearing about his receipts for professional services at any other theatres, than in New York.

Cross-examined:

Q. At the engagements of which you spoke, do you recollect of Mr. Forrest's health being affected by playing?

A. It was upon several occasions, so much so, that some of the engagements, more than one, were broken
2849 up.

Q. How serious was his illness?

A. He was confined to his bed for a length of time on one occasion; the engagement was abandoned; I think it was the last season he played with us; of my own knowledge I do not know by what it was brought on; I think he has not played since; certainly not in New York, or Philadelphia.

Re-direct:

Q. Did you mean to say that to your knowledge Mr. Forrest's health was affected by playing?

A. Of my own knowledge, I know nothing of the
2850 cause.

C. S. MARSHALL.

PHILIP WARREN, *recalled by the plaintiff*:

Q. Are you now able to state the amounts paid by you to Edwin Forrest, for professional services in the Broadway Theatre of New York, during the periods before inquired of?

A. I am not, without reference to this paper; I made it out two years ago.

Q. Is it in your own handwriting?

A. Yes, sir.

Q. What did you make it from?

A. From the books of the theatre.

Q. Do you mean from the books of account kept by you as treasurer, and of which you spoke on your former examination?

A. Yes, sir.

Q. Have you recently compared that paper with those books?

A. Yes, sir.

Q. How long ago?

A. To-day.

Q. Refreshing your memory by your own entries in those books on that examination and with the aid of this paper made from them, are you able to state what moneys you paid to Mr. Forrest, in the years stated?

Defendant objects to so much of the question as is in these words "and with the aid of this paper."

Objection overruled.

2852

A. I can read them off from this paper, and not without it; I cannot carry the figures in my head.

Q. How much did you pay Mr. Forrest for his engagements in the seasons '51 and '52?

Question waived.

Q. What is the book now present before you?

A. It is the ledger of the Broadway Theatre.

Q. Do you find, on the twentieth page of that ledger, an account purporting to be of moneys paid by you to Mr. Forrest for his services in that theatre?

2853 A. I do.

Q. Did you know those entries to be true at the time you made them?

A. Yes, sir.

Q. Otherwise than by producing the book, or reading off from the book, could you remember them now?

A. No, sir.

Q. What amount is there stated as having been paid to Mr. Forrest by you between September 22d and October 8th, 1853, inclusive?

Defendant objects; not an original entry of any payments made at the time; it professes to be an aggregate
2854 or total amount of payments made at different times and in various sums, and is evidence of nothing against the defendant. Objection overruled.

A. Six thousand one hundred and eighty-two ³⁷/₁₀₀ dollars.

Plaintiff offers in evidence the page objected to by defendant, on the same grounds, so far as same are applicable.

JUNE 17TH.

Q. Have you, since you were last here, examined your own entries in the cash books of the Broadway Theatre, and copied from such cash books each entry of a payment made by you to Mr. Forrest from September,
2855 1851, to April, 1857, inclusive?

A. I have.

Q. Look at the paper handed to you and say whether that is such copy, with a summing up in periods at the end?

A. Yes, it is.

Defendant objects, first, to receipts prior to recovery of the judgment, and to each year since severally, on the ground that the plaintiff cannot recover arrears of alimony. Objection overruled.

Q. Are the original cash books from which you copied those entries here present?

A. They are.

2856

Q. Did you know those original entries to be correct at the time you made them ?

A. Certainly, sir ; I certainly am not now able to remember the original payments otherwise than by referring to the original entries and reading them off.

The paper mentioned by witness is now produced and offered in evidence as part of his deposition, and marked C.

The books are offered for the purpose of verifying this copy, if necessary or desired. No objection being made to the reception of No. 6, it is received in evidence.

P. WARREN.

JAMES P. KILBRETH, *for plaintiff* :

I reside in Cincinnati, Ohio ; at present, I am the trustee of the Ohio Life and Trust Company in liquidation ; I have resided there twenty-seven years ; I am well acquainted with Covington.

Q. Are you acquainted with a piece of property in Covington belonging to Mr. Forrest ?

A. I never made it my business to inquire, but property has been frequently pointed out to me as Mr. Forrest's property.

Q. Describe it ?

A. Its situation is contiguous to the city of Covington ; I believe not within the corporate limits ; the number of acres I am not informed of, but my impression, but on which I cannot myself rely, is that there is somewhere from 50 to 100 acres ; it is west of the city of Covington, on a pleasant acclivity, facing the city of Cincinnati, rather obliquely ; it has a special name, but I can't recall it, unless it is suggested to me ; I think it is not Forrest Hill, but some sort of a hill ; I think it is a very short distance from the river—the main part of it perhaps the sixth part of a mile—three or four hundred yards ; the city of Cincinnati is immediately opposite to it ; it can be seen from the city, and

the city from it ; I used to be more than I am now acquainted with the value of property in Covington; and
2859 I am now.

Q. What is that property worth per acre ?

A. People there, who know as much or more about such things than I do, differ very much in their estimates of property ; my idea is that a part of the tract would be worth say \$1,500 an acre, and another part not over \$500 ; the city of Covington has a population of from 30 to 40,000 ; this property is, I should think, about three-fourths of a mile from the built part of the city—perhaps more than that in the route they would have to take to get to it ; the population of Cincinnati is about 225,000 ; the river is about 400 yards in width there ; I have owned property in Covington.

2860 Q. Do you know certain stores of Mr. Forrest in the city of Cincinnati ?

A. Only as they have been pointed out to me in the same way as the Covington property was.

Q. On what street, on which side, and how many are they ?

A. The locality is on the corner of Main and Ninth streets ; the quantity of land I do not know, or the number of stores ; the stores front on Main street ; there may be a store fronting on Ninth street, in the rear of the lots ; this is on the east side of Main street.

Q. Are you acquainted with the value of property in Cincinnati ?

2861 A. Yes, sir ; pretty well.

Q. What is the value of the Main street property which you have described ?

A. I can't state the value without knowing the quantity.

Q. Supposing them to be several stores-lots, how much per foot on Main street are they worth ?

A. The corner lot of 25 feet, then, I should think would be worth \$750 per foot ; the others, I should think,

would not be dear at \$600, and cheap at \$500 per foot; the value is about the same after you get away from the corner; on reflection, I think \$550 per foot would be enough for them.

Cross-examination:

2862

I have property in Cincinnati—real estate; I have a few thousand dollars' worth; I have held property there pretty largely, and do now; I do not own any property in Covington now; I suppose I sold out there ten years ago; I have not bought or sold property there since; for many years, when a younger man, I was a book-keeper and accountant; subsequently, for many years, I was a lumber merchant; my last business was that of the Cincinnati sugar-refinery, which burnt down a year and half ago; since then I have not commenced any new business; I have bought real estate upon speculation—that is, I bought it at one price and sold at another; what I now own I have held many years, how- 2863
ever; this Covington property was first pointed out to me as Mr. Forrest's property about fifteen years ago; I can't say of my own knowledge, how it has been occupied, but I have understood by a tenant of his, simply to take care of it and to keep it in good order; improvements are very inferior; if I were to buy the property, I hardly think I should value them much; the buildings are of little value, and I always looked on them as temporary; I think there is a dwelling-house of some kind; I should think it yields very little if any revenue or income, perhaps enough to pay the taxes; the part that I say is worth \$1,500 per acre, I cannot give the proportion of; 2864
it is the part that is easily accessible from the road; this Cincinnati property has, I rather think, if anything, diminished in value the last few years; the value I have given is its present value, and independently of the buildings; I should think the land worth about as much without the buildings as with them; though it would perhaps cost \$5,000 to put up one such store as that on

the corner ; but the buildings are not of such a character as a person paying such a price would want ; I have heard of no sales of property in Covington recently ; I don't think property is selling there now with any sort of facility ; I know of a number of sales in Covington within a twelvemonth, but not in the neighborhood of
 2865 Mr. Forrest's premises ; the last sale that I know of, in that immediate vicinity, was a number of years ago—a tax sale ; I gave no rule of the value of property then ; about six years ago Mr. Chambers sold a piece of about four acres ; small lots I have known to be sold ; I would not buy any of this property at any of these prices ; I have given only what I supposed to be the market prices ; if anybody should go there to buy this property, I suppose the holder would not like to take less ; I do not believe those lots would bring that price at auction, if it was forced into the market ; I can't venture to answer what this Covington property of Mr. Forrest's would bring at auction on fair notice ; I can't form an
 2866 intelligible estimate ; on public sale, on fair time, I think the Cincinnati property would come pretty near the prices that I have named ; I think it would bring within ten or fifteen per cent. of what I have named, if it were put up at auction ; I would not give that for it ; I don't want to buy any more than I have got. (The last sentence objected to by defendant, as not responsive. Objection overruled.)

JAS. P. KILBRETH.

JUNE 17TH.

SAMUEL D. BABCOCK, *for plaintiff* :

I reside in the city of New York.

Q. Are you well acquainted with the town of Yonkers ?

2867 A. Yes, sir ; I live in the vicinity in the summer ; I have looked at the description of property in Ex. No. 3 ; I am acquainted with the value of property in the vi-

cinity of the premises there described ; I have been frequently on those premises.

Q. What, in your judgment, is the market value per acre of the land mentioned in that deed ?

A. I should consider \$1,500 per acre to be a fair valuation of that ground.

Cross-examined :

I own land within half of a mile of it, south of this property ; I am interested in some sixty acres now, 2868 bought seven years ago, I think ; the prices then varied materially, according to the locality ; that having a river front would command fully three times as much as that not more than a quarter of a mile back ; the cost of one hundred acres, which I bought at that time, was \$500 per acre ; it ran back three-fourths of a mile from the river, and embraced land of much less value than that ; I think there were 1,300 feet of front on the river ; we resold some forty acres, that is, it has been divided among the owners ; we have absolutely sold about twenty-five acres ; the largest parcel, I think, was about nine acres ; I reside six months in the year upon a part of it ; we are not offering the residue for sale, and have 2869 not been for some time past ; we think it for our interest to hold it ; we have never offered it for sale at all ; I do not think there has been any sale of unimproved land there for two or three years, nor of any being offered.

My firm is Babcock, Brothers & Co., in Wall street ; we are bankers ; I have been on the ground of the Font-hill property several times, in six or seven years past ; up to the time of Mr. Forrest's leaving, it was not occupied in such a way as to yield any revenue, I should think ; the " Castle " was unoccupied ; the other dwelling was occupied occasionally ; whether this land was tilled, I do not know.

2870

Only one of my associates in the purchase of the 100 acres lives on the premises ; I was not on this land of

Mr. Forrest's with a view to purchase, or to determine its value ; I don't know that I would give \$1,500 per acre ; I will give \$1,000 per acre cash for the property on delivery of the deeds.

Re-direct :

I am a freeholder in the city of New York.

S. D. BABCOCK.

JUNE 23D, 1859.

2871 Plaintiff gives in evidence an exemplification of a deed from Elijah Weeks to Edwin Forrest, dated May 1st, 1838, property in New Rochelle. No. 7. 20th June, 1859, date of exemplification.

SAMUEL F. COWDREY, *sworn for plaintiff :*

I am an attorney and counsellor at law ; I live at New Rochelle, in Westchester county ; I have resided there ten years ; I am a freeholder in that town.

Q. Are you acquainted with the premises described in the deed (No. 7) just read ?

A. I know the property which I presume is referred to in this deed, but I do not know it precisely by this description ; but I know the property lying on the
2872 west side of the road, well known as Mr. Forrest's place, or Mr. Leggett's, and from the description in the deed I have no doubt it is the same.

Q. Are you acquainted with the value of real estate in that vicinity ?

A. I am.

Q. What is the fair market value of that property at this time ?

A. That place is worth from \$4,500 to \$5,000.

Cross-examination :

There is a very nice dwelling house upon it, a barn, and some other improvements ; they were erected before I removed to New Rochelle, more than ten years ago ; I should think that building was worth \$2,500, including
2873 the out-buildings.

S. F. COWDREY.

Plaintiff puts in evidence the appearance of defendant in this case, to show the time of the commencement of the suit. Ex. No. 8.

Also, an exemplification of a deed from Edwin Forrest to John G. Cameron, dated 8th March, 1856, for a house and lot, No. 271 West Twenty-first street. Ex. No. 9.

Also, an exemplification of the same date, from the same, to Jane and Euphemia Cameron, for house and lot 282 West Twenty-second street. Ex. No. 10.

Also, another exemplification of a deed from same to 2874 Philip F. Pistor, dated March 1st, 1856, for certain buildings and land on the south side of Twenty-second street. Ex. No. 11.

Exemplification of another deed from the same to Thomas B. Coddington, dated March 8th, 1856, for two brick dwelling-houses and lots, on the southerly side of Twenty-second street. Ex. No. 12.

JUNE 28, 1859.

THOMAS W. WHITBY, *for plaintiff*:

I reside in Hoboken, New Jersey, and am by occupation what you may call a jack-of-all-trades: justice of the peace, artist, and editor of a paper. [The witness 2875 says that he does not desire that expression, jack-of-all-trades, to be taken down, but is reduced to writing at the request of defendant's counsel.]

I know the plaintiff and the defendant in this action; I should suppose my acquaintance with the defendant would extend back to between 1835 and 1840, to this time.

Q. Were you acquainted with his property at Covington, in the State of Kentucky?

A. Yes, sir.

Q. Did you reside upon it for a time? and if so, how long?

A. About four years; it might have been a little 2876 longer, but certainly four years.

Q. When were you last there ?

A. Not since I left it for the East ; it must have been about 1848.

Q. Under whom did you occupy ?

A. Mr. Edwin Forrest.

Q. How many acres of land are there in that parcel at Covington ?

A. The original property was either 47 or 49 acres, and two acres were subsequently added by Mr. Forrest, by purchase. /

Q. What, according to your best judgment, was the value of that Covington property at the time you last
2877 saw it ?

Defendant objects. Evidence allowed.

A. I should suppose that the property has two kinds of value—one for agricultural purposes, and the other for building sites ; about nine acres, that which overlooks the Ohio river, Cincinnati, and Covington, I should suppose that the purchase of, for \$20,000, at that time, considering the rise of value, would have been a good purchase.

Defendant objects. Evidence allowed.

The remainder is adapted to the culture of the grape and other horticultural purposes ; the land is rich and good ; it has a very valuable quarry of lime stone, and
2878 I should suppose worth about \$150 an acre.

Q. Were you also somewhat acquainted with Mr. Forrest's property on Main street, in Cincinnati, Ohio ?

A. Yes, sir.

Q. What was that property, and state its location ?

A. They were stores on the corner of Ninth and Main streets ; on the right hand of Main street as you go up ; on the east side, I think.

Q. How many stores were there ?

A. I am not sure whether the lots were four or six, and either two or three stores on Main street.

2879 Q. Were you ever in the dwelling house of Mr. For-

rest, in the city of New York, whilst he and the plaintiff in this action were living together in matrimony?

A. Yes, sir.

Q. Have you taken meals with them in their house?

A. I have.

Q. About what date were you thus in their house?

A. It must have been about 1836 or 1837 to 1842 or 1843; it was about two or three years previous to my going to Kentucky; they then resided in Twenty-second street, New York.

Q. State in what kind of house and lot, and give just a general idea?

2880

A. The house was larger than the usual house—more than twenty-five feet front; it had a fine lobby and broad stair-case, which are not common to a 25 foot house; it was one of the finest houses of that time, handsomely furnished; a three-story house; well built, of brick; I think it was painted in a drab color, or yellow; it contained on the first story, on right hand as you enter, a parlor, and in the rear of that a drawing-room running across the whole house, elegantly furnished; on the second floor, over the drawing-room, was the library.

Q. What was the character of that library, the number of volumes, the value, as near as you can judge?

A. That is very difficult to answer; I had seen none comparable to it in point of volumes and the variety of subjects, and the general appearance of the whole; I had occasion to scan them more than once; I should suppose there were several thousand volumes; six or eight perhaps, more or less; I should suppose such a library would cost ten or fifteen thousand dollars for books and book-cases.

Q. Had you occasional opportunities of observing the scale, in point of expenditure, on which Mr. Forrest kept up that establishment?

A. Judging from my own experience, from occasional

2882

visits there, sometimes on invitation, and meeting gentlemen, assuming ordinary hospitalities, I should suppose eight or ten thousand dollars to be Mr. Forrest's annual expenses, in the style in which he maintained that establishment.

Defendant objects to this answer, as not responsive, and second, that the witness has no means of knowledge on the subject.

Evidence allowed.

Q. Independently of servants, or occasional visitors, who constituted the family?

2883 A. Mr. Forrest and his wife, Miss Margaret Sinclair, Mrs. Forrest's sister, and another sister, younger, Miss Virginia Sinclair, I have seen there; I should suppose about ten or twelve years of age; I am not so clear about having seen her there.

Q. Are you a man of family, and how long have you kept house?

A. I am, and have kept house about thirty years.

Cross-examination:

I am an Englishman.

Q. Who introduced you to Mr. Forrest's house?

A. My first visit was at his own invitation, when he visited my house in the Sixth avenue; I think Judge
2884 Conrad was with him at the time; it must have been in 1836 or 1837; it was about three years previous to my going to Kentucky; I was living near the corner of Sixth avenue and Twenty-second street; I occupied that house, not the whole of it; Mr. Godwin boarded with me, and his board was equal to the rent; a two-story brick house with attic; I was in the pursuit of my profession as an artist, and occasionally writing for the papers.

Q. Was it on you or on Mr. Godwin that Mr. Forrest called?

A. I should rather say on both, though I am not
2885 clear.

Q. Why can't you tell whether he called on you or on Godwin ?

A. The circumstances do not impress themselves on my mind sufficiently to enable me to say ; I presume it may have been on Mr. Godwin, from their previous intimacy, but I think I was entitled to a call from him myself.

Q. Had you any acquaintance with Mr. Forrest previous to that ?

A. I think that I had called on Mr. Forrest with Mr. Godwin, one Sunday previously ; we walked out on the avenue for miles.

Q. Then Mr. Godwin took you first to Mr. Forrest's 2886 house, did he ?

A. My impression is that my first visit to Mr. Forrest's house was at the instance of Mr. Godwin.

Q. Who walked on the avenue that you speak of ?

A. Mr. Forrest, Mr. Godwin, and myself.

Q. What date, as near as you can recollect it ?

A. It was on a Sunday morning, two or three years previous to my going to Kentucky ; I cannot remember the date.

Q. Was that the first time that you were at Mr. Forrest's house ?

A. I cannot recollect.

Q. Was that before or after Mr. Forrest called ? 2887

A. I should say it was before.

Q. How long were you in Kentucky, and when did you go ?

A. I was in Kentucky about four years, and the best data I have for my going would be in 1843 or 1844, as I returned in 1848.

Q. Did you ever visit Mr. Forrest's house after your return ?

A. No, sir.

Q. Was your first visit two or three years before you went ?

2888 A. I should suppose it must have been a couple of years, at any rate; I think it must cover two or three years.

Q. How many times will you undertake to say that you were at Mr. Forrest's house?

A. Well, it is hard to say; I have dined there frequently; spent Sunday with him in his library, and met his friends there.

Question repeated.

A. It would be mere conjecture; I could not answer the question to the satisfaction even of myself.

Q. Can you state any thing like the number of times
2889 you have dined there?

A. I recollect two or three dinners, because of the company that were present; it is not likely that I should remember a mere dinner without some reference to the company.

Q. Have you dined there five times?

A. I would not say I had.

Q. Have you taken ten meals in the house?

A. I should say not.

Q. Do you know any thing of the actual cost either of what was consumed in the house, or the wages of the
2890 servants?

A. Nothing at all, sir.

Q. Wasn't this a two-story house?

A. I rather think it was, a two-story and attic house with a basement.

Q. Were there not a hundred finer houses in town at that time?

A. I should suppose yes, and a great many more.

Q. What other libraries have you seen?

A. I have been in the house of Mr. Bryant, Dr. Grey; other houses I have not noticed any libraries, except a few books they called a library.

2891 Q. Is there any thing in your own expenses of living by which you can estimate those of Mr. Forrest?

A. Yes.

Q. What?

A. My average expenses, living very plainly indeed, would be from \$700 to \$1,000 a year, and this in part of a house; I infer from that, comparing the two establishments, that Mr. Forrest, in his domestic responsibilities, would be subject to eight or ten times that amount.

Q. Is it from this experience and the opportunities you have had of observation of Mr. Forrest's expenses, that you form your estimate that it cost him eight to ten thousand dollars to live? 2892

A. Not entirely; I have heard his hospitality and liberality spoken of by others, who have been in the habit of visiting him.

Q. What else?

A. Nothing.

Q. Then the only other mode of estimating, beyond the observation and experience to which you have referred, is from what you have heard others say?

A. That is all, sir.

Q. Did you ever buy or sell any real property in Covington?

A. No, sir.

Q. Ever own any there? 2893

A. Not to my recollection, sir; I was thinking whether I might have bought a burial ground lot or not; I have owned no real estate in Kentucky, Ohio, New Jersey, or New York, beyond a burial, and that I don't own yet.

Q. What did that Covington property yield Mr. Forrest while you occupied it?

A. Nothing but the improvements which I left on it—a vineyard planted; the land was cleared from timber and rock, and plowed and cultivated while I was there.

Q. Did you put any other improvements upon it?

A. I made an extensive kitchen garden, and planted 2894
shrubbery around the chateau, or Swiss cottage; I

made roads and thousands of feet of fences all over the estate, inside and out; and rock; I brought six acres of land, I may say eight acres, from a state of nature to a state of high fertility.

Q. How much of it was under cultivation when you left?

A. I left in the spring of the year; the vineyards, the upper and lower, covered about two acres, the kitchen garden, the two acres of subsequent purchase, had been in wheat; there was a piece of land cleared, and below
2895 the fence which inclosed what might be called Forrest Hill, of about three acres more.

Q. What rent did you pay? what amount, and in what kind?

A. I do not know the amount; the kind was my personal services on the estate.

Q. Did you pay any money rent?

A. No.

Q. Did you receive any thing that was raised on the property?

A. I did.

Q. What were you paid to quit?

A. I think the sum was \$400.

Q. What personal service did you render?

2896 A. I labored on the estate bodily; directed the operations of the workmen, when I had money to employ them; my universal practice was to labor every day on the estate; and took the general management of the estate.

Q. Can you specify any other personal services on the estate?

A. I cannot.

Q. Who paid the men?

A. I paid them, partly with moneys received from Mr. Forrest, and partly from the proceeds of things sold from the estate.

2897 Q. Have you been in Kentucky since you quit Covington?

A. No.

Q. Did you see any real property sold at Covington while you were there ?

A. Yes ; a great deal was sold.

Q. Was any part of this property, or any in the neighborhood, sold ?

A. Yes ; pasture-land for building lots, and building lots as you approach Covington from Forrest Hill.

Q. How near to Mr. Forrest's property ?

A. Adjoining.

Q. Which side ?

A. The front, entirely towards Cincinnati. 2898

Q. What other sales near his property ?

A. I think his next-door neighbor, Mr. Griffith, Mr. Kidd, the carpenter ; these were engaged in buying and selling ; indeed, the speculation was so high at that time, that building lots had risen 500 per cent. in Covington.

Q. Were you engaged in your profession as an artist at that time ?

A. Occasionally ; yes.

Q. Did you visit New Orleans for that purpose, and how long ?

A. In the fall of the year I went to the Memphis Convention, and then proceeded to New Orleans for a week, 2899 taking with me a few sketches of Kentucky scenery.

Q. Was this in any way connected with Mr. Forrest's business ?

A. Not in the slightest.

Q. Have you had a difference with Mr. Forrest, which has suspended your intercourse ?

A. Yes.

Q. Did your conduct on the place produce that difficulty ?

A. No.

Q. Did this difference occur while you were on the Covington place, and has it continued since ? 2900

A. Yes.

Q. Has your intimacy with the plaintiff continued ?

A. Only while she has been in New York.

Q. Have you been active in reference to this suit ?

A. No farther than being here by request of the attorney and counsel of Mrs. Sinclair (the plaintiff).

Q. Have you not been a witness before ?

A. Yes ; in the divorce suit.

Q. Have you not suggested to her testimony ; or to her counsel ?

A. I have no recollection of the kind, not the slightest, although, in conversing on the subject, I may have mentioned circumstances that might throw light upon it, but I have no recollection of any person or place.

Q. Did you recently apply to a friend of Mr. Forrest to get him to settle this suit ?

A. Conversing with Mr. Fenno, an actor, we both deplored—(Counsel for the defence objects to proceeding with the answer ; witness allowed to proceed)—the unhappy difference between the parties, and I think I expressed the opinion, without any authority from any one, that Mr. Forrest had better compromise the matter and settle it.

Q. Did you ask Mr. Fenno to speak to Mr. Forrest on the subject ?

2902 A. I do not recollect doing so ; I might have said, You had better speak to Mr. Forrest on the subject.

Q. Did you say it might be done for a small sum ?

A. No.

THOMAS M. WHITBY.

ROBERT BALMANNO, *for plaintiff* :

I reside in South Brooklyn ; I am in the Auditor's Department of the Custom House in New York.

Q. Do you know the plaintiff in this action, and how long have you known her ?

A. I knew her before she was married, some time.

Q. Were you acquainted with her father and mother ?

2903 A. I was.

Q. Of what country are you ?

A. Of Scotland.

Q. When and about what time did you emigrate to this country ?

A. In the end of 1829.

Q. Where had you resided immediately before your emigration ?

A. About 30 years in London, England.

Q. Did you know the plaintiff's father and mother, and had you seen her, the plaintiff, before you emigrated ?

A. I had seen her and her father, but not her 2904 mother.

Q. At the time you emigrated, was the family residing in London ?

A. They were.

Q. Subsequently to your emigration, did you ever pay a visit to London ?

A. I did.

Q. At what time was this visit ?

A. It was in 1836.

Q. Whilst you were in London on that occasion, had you any intercourse with the family of Mr. Sinclair, the plaintiff's father ?

A. I had known Mr. Sinclair many years before, and also when he was out in this country giving con- 2905 certs ; I therefore called and left my card at his house, upon which I received an invitation to dine with him ; I dined with him and saw his wife and daughters, and went with them to see Mr. Forrest's first appearance in Shakespeare.

Defendant objects to the admission of this evidence, as irrelevant.

Evidence allowed.

Q. Was the plaintiff one of this party ?

A. She was.

Q. In what part of the city of London did Mr. Sin- 2906

clair and his family then reside, and what was their style of living ?

A. He resided in Alfred place, Bedford square, a short beautiful street, with two crescents, one at each end, and full of the most respectable company ; the house was an elegant one, and beautifully furnished, and I never sat down to a more elegant meal than it.

Defendant objects to the witness's opinion and general statement.

Evidence allowed.

2907 They were living in a beautiful house.

Q. As to the apparent style of living of the female members of that family, say the mother and Miss Catharine Sinclair, what was it ?

Defendant objects to the question.

Evidence allowed.

A. That of well educated and well brought up ladies, unquestionably ; the mother was an exceedingly well brought up lady, the daughter of an officer in the British army, who was killed in Egypt.

Cross-examined :

Q. How long have you been in this country ?

A. Since the beginning of 1830, with the exception of
2908 my visit in England, in 1836, about six months.

Q. What has been your occupation, whilst in this country ?

A. I first went out to Geneva, and was some time engaged in the Pultney estate, as one of the three clerks who managed the estate, and it was on the business of that estate that I visited London, in 1836 ; I returned to
2909 Geneva, and became ill, and then came down to N. Y., and was some time book-keeper to James Depeyster Ogden ; when Mr. Hugh Maxwell was appointed Collector, he gave me a situation in the Auditor's office, which I have retained ever since.

Q. What is the place called ?

A. I am the head of the Tonnage Department.

Q. Is it called a clerkship?

A. It is.

Q. Under whose direction did you go to England?

A. The Hon. John Greig, of Canandaigua.

Q. Was he the agent of the Pultney estate?

A. He was not directly, but indirectly.

Q. Who was agent?

A. Joseph Fellowes.

Q. How long were you in London?

A. About six months.

Q. How many times were you in Mr. Sinclair's house? 2910

A. Twice, only.

Q. What was the other occasion?

A. The first occasion was calling; then dining.

Q. Did you see his family upon any other occasion at that time?

A. I did not.

Q. What was the size of the house?

A. It was not large, but of the same size as all the houses in Alfred place, or the Crescents at each end.

Q. Please state the size of the house, as near as you can.

A. I should say about 25 feet frontage, and three stories high; it might be a little more or less.

Q. About what rent would be paid for those houses? 2911

A. I have not the least idea; I resided in the same neighborhood with my brother, but he owned the house he lived in, or I might have known something about rents.

Q. Was there any company at dinner besides the family and yourself?

A. None; this was merely an invitation of the day before to go and see Mr. Forrest's first appearance in Shakespeare.

Q. What time did you dine, and what time break off it?

2912 A. Dined at five, and went to the theatre about seven.

Q. What was Mr. Sinclair's occupation?

A. He was not engaged on the stage at that time; but his occupation was an actor and performer in operas; he had a beautiful voice.

Q. Where did he act?

A. He acted at both theatres—Drury Lane and Covent Garden.

Q. In English opera?

A. Yes, sir.

Q. Did he give concerts?

A. I really do not know whether he did in England, but he did in this country, and was very successful.

Q. Did he come to this country afterwards?

2913 A. I believe he did, but I did not see him.

Q. Do you know where he lived here?

A. I do not.

Q. Or how long he remained?

A. I do not know.

Q. Were you guardian *ad litem* or next friend for Mrs Forrest in the suit against Mr. Forrest?

A. I was not.

Q. Was your name used in that way?

A. Not to my knowledge.

Q. When have you seen Mrs. Forrest?

A. The day before yesterday, for a very few minutes.

Q. Were you sent for by her?

2914 A. No, I was not.

Q. Was what you were to testify to spoken of?

A. Not one syllable; she did not know I was going to testify.

Q. When had you seen her before?

A. Some time previously, when she returned from the West.

Q. Did you visit her at your own suggestion, or at the request of some other person?

A. Solely at my own instigation.

Q. Have you spoken with any one, in reference to the testimony you have given ?

A. Certainly not ; Mr. O'Connor asked me if I knew 2915 where Mr. Sinclair lived in London previous to coming out here, but not a word about the testimony.

Q. Please state, as briefly as you can, what there was remarkable about Mr. Sinclair's house, his furniture, or entertainment ?

A. I cannot say there was any thing remarkable ; his house seemed to be furnished in the very best style ; there was an elegant piano ; the most extraordinary thing I saw in the house was the grace and beauty of his daughter ; she was to me the perfection of beauty ; she was the most beautiful creature I ever saw in the world.

2916

Q. I ask you of the house, the furniture, and the entertainment, which you speak of as elegant ; are you able to describe any thing of either of these particulars ?

A. I really don't know that I can state any thing more than I have stated—the furniture was very elegant—unless you ask me some particular question.

Q. What was remarkable in the house or the dinner ?

A. If you will put a particular question, I will answer, but otherwise, more than I have stated, I cannot say ; it was an elegant served-up dinner, but I am no 2917 gourmand, and do not care a snap of the finger about eating and drinking.

Q. Can you remember any of the furniture, except the piano, as remarkable ?

A. I do not ; they were all of the best sort, to my humble judgment, and I have seen a good many, and have dined with English noblemen of rank.

Q. What noblemen have you dined with and when ?

A. Lord de Dunstanville and Sir John Swinburne ; but I had the honor to be the Secretary of the Artists'

2918 Benevolent Fund, and, in consequence of my position, sat opposite the Marquis of Lansdown, Prince Leopold, the present King of Belgium, and Lord Palmerston, and many others at this dinner ; they were the Chairmen ; this was, say, from 1825 to 1828.

Q. Who is Lord de Dunstanville, and when and where did you dine with him ?

A. He was created a peer by William Pitt, and lived in Knightsbridge, a little beyond the Horse Guards Barracks ; at the present moment it is impossible for me to say when it was I dined with him ; it was at his house at Knightsbridge, very close to Lady Blessington's, where she lived ; at a distance of 40 years, it is very difficult for me to specify times.

Q. Was it more than once.

A. Yes, twice, by invitation both times.

Q. Was Mr. Sinclair's establishment equal to his ?

A. I should say not, though very little inferior to it ; it could hardly be expected.

Q. What was Lord de Dunstanville's name ?

A. An English nobleman never signs any thing but his peerage name ; I really forget what his name was before he was created a peer, although it is floating in my mind.

2920 Q. What connection had he with the Artists' Benevolent Society ?

A. He was merely an annual subscriber.

Re-direct :

Q. Were you a number of years ago next friend for Mrs. Forrest in some law suit ?

A. I was when Mr. Forrest wished to bring a suit in Penn., and she wished to restrain it ; she applied to me, as her oldest friend in this country, to become her next friend, and I could not refuse it.

Defendant objects to the last sentence of the answer.

Objection overruled.

Q. Did you understand the suit in which you were 2921
next friend to Mrs. Forrest to be a prosecution by her,
or a defensive proceeding.

Defendant objects. Objection overruled.

Question waived.

Q. What did you understand to be the character or
nature of the proceeding in which you became next
friend to Mrs. Forrest?

Defendant objects. Objection overruled.

A. I understood it was to restrain Mr. Forrest from
bringing a suit against her in another State.

Q. About what age was Miss Catharine Sinclair, the
present plaintiff, when you saw her in London in 1836? 2922

A. I am a very poor judge of age, she might have
been 12, she might have been 16 years of age.

Re-cross:

Q. From whom did you get your information of the
object of the suit, in the suit in which you were next
friend?

A. I really cannot be sure, but I think it was probably
from Mr. Chase.

Q. Had you any personal knowledge of the facts?

A. Merely what was given in the newspapers.

ROBERT BALMANNO.

Adjourned to June 29th, at half-past 1 o'clock.

REFEREE'S MINUTES, JUNE 29, 1869.

THEOPHYLACT B. BLEECKER, *sworn for plaintiff:* 2923

I reside in the city of New York, and am a real estate
agent.

Q. How long have you been concerned in the sale of
real estate.

A. Over 25 years.

Q. Look upon the paper marked in this case, Exhibit
No. 11, purporting to be an exemplification of a deed
from Edwin Forrest to Philip F. Pistor, of certain pre-

mises in 22d street, in the city of New York, and say whether you are acquainted with those premises?

2924 A. I know the house Mr. Pistor bought, but as this describes it, by feet from the avenue, I cannot tell.

Q. Did you know of a sale of a house and lot in 1856, to said Pistor, by said Forrest, and if so, about what was it worth, and what its number in the street?

A. I think the sale was made early in January, 1857; the width was 33 feet, as far as my recollection goes, and from 90 to 96 feet in depth; the number at that time was 288 West 22d street, south side.

Q. Have you made an estimate of the value, according to your judgment, in the year 1856, of certain houses and lots, on 22d and 21st streets, in a schedule now offered in this cause, and marked Exhibit No. 13?

2925 A. I have.

Q. Does that exhibit state, according to your judgment, the fair value, in 1856, of the several lots there mentioned?

A. It does.

Q. Have you made an estimate, according to your best judgment, of the fair annual rental of the houses mentioned in that schedule, in the years from 1850 to 1857, inclusive?

A. I have.

Q. Is your judgment set down there in order on the schedule?

A. Yes, sir.

Q. Why have you not stated any particular annual value of rent for the lots 275 and 277 Twenty-first street?

2926 A. Because there was no time specified as for a lease, the lots being vacant, and you could not expect a man to pay any great rent for one or two years.

Q. Can you say about what the annual value of those two lots was, from 1850 to 1857?

A. I cannot.

Paper above referred to put in evidence, marked Ex. No. 13.

Cross-examined :

Q. Was this the unincumbered fee you estimated?

A. Yes, sir.

Q. Did you sell those lots?

A. No, sir.

Q. By whom were they sold?

A. By A. J. Bleecker & Co., I believe.

2927

Q. Is he a connection of yours in business or otherwise?

A. I am a brother, but am not one of the firm; I attend to private sale business in their office.

Q. For whom did you make these estimates?

A. I made them at the request of Mr. Chase.

Q. How did you get at the rents?

A. I got at them from the houses rented in that neighborhood, similar houses in that neighborhood rented in those years; I got it from information received from parties owning houses in that neighborhood, Mr. Cushman and others.

Q. What others?

2928

A. Mr. Wells; I asked some others, who I do not recollect; Mr. Floyd Smith, I think, was one; I think of no others.

Q. What allowance did you make for taxes and repairs on 284 West Twenty-first street?

A. I don't know that I made any.

Q. Did you make any allowance for taxes and repairs on any of them?

A. No, sir.

Q. Then these are estimates of gross rents, are they?

A. Yes, sir.

THEO. B. BLEECKER.

HAMILTON W. ROBINSON, *sworn for plaintiff:*

2929

I am an attorney and counsellor-at-law, and reside in New York, and was one of the attorneys of record in this action, until the first day of January, 1868; the

statement of the proceedings had in the cause, and made up and handed in by the plaintiff's counsel, I believe to be substantially true. Marked Ex. No. 14.

Cross-examined :

Q. Had Van Buren and Robinson the exclusive control of the suit while they were associated ?

A. They had ; Mr. Ogden Hoffman assisting at the trial ; I have no other recollection of any professional
2930 gentleman assisting.

Q. Were any steps taken by plaintiff, after the entry of the order of July, 1856, and up to the time of your dissolution with Mr. Van Buren, to proceed in the cause, or to notify us of the intention to do so ?

A. None that I have any knowledge of.

H. W. ROBINSON.

WM. CURTIS NOYES, *sworn for plaintiff*, of the city of New York, counsellor-at-law :

I have been for many years an attorney and counsellor-at-law, practicing in the courts of this State.

Q. Please to look at and read over the memorandum of proceedings in this action, marked Ex. No. 14 ?

A. I have read it.

2931 Q. What, in your judgment, would be the reasonable charges and expenses of the plaintiff in that action for counsel fees, over and above what might be taxable as costs merely ?

A. That is a question which I can't answer without more reflection, as I was not aware that I was to be examined until within the last half-hour, and did not know upon what, until I came ; but I will look into the matter and give an answer if you desire.

WM. CURTIS NOYES.

Adjourned to June 30, at 12 o'clock M.

JUNE 30TH, 1859.

WM. CURTIS NOYES, *recalled by plaintiff* :

2932 The witness proceeds to answer the last question.

A. Considering the importance of the case, and as I see from the statement, Ex. No. 14, it occupied something over five years, in my opinion \$7,000 would not be an unreasonable sum for counsel fees to leading counsel at the New York bar.

Q. Please to answer the question without any reference to counsel, and assuming simply that the counsel possessed sufficient capacity to conduct the case?

A. My answer is the same.

Cross-examined :

Q. Is your estimate formed upon the paper exhibited 2933 to you, marked Ex. 14?

A. Not exclusively.

Q. What is it based on?

A. From having examined the case heretofore; having read the trial while it was in progress; from having been present during a portion of it, and from having been in court, while the appeal was under argument, for a short time.

Q. Do you know of any items of service rendered by counsel other than those mentioned in Exhibit No. 14?

A. I do not recollect any thing within my own personal knowledge.

Q. Have you made any detailed estimate of the value of these services, and, if so, will you state them?

A. I made an estimate for the purpose of arriving at the conclusion, which exceeded the amount mentioned by me a few hundred dollars, and then came to the conclusion that the sum which I have named was reasonable.

Q. Will you give it to us?

A. My estimate, roughly made in pencil, I hand to the Referee, marked Ex. No. 15.

2935

Q. Have you frequently been employed by the city moneyed corporations, foreign and domestic bankers, and engaged in litigations involving a large amount of property?

A. I believe I have been employed by all the parties enumerated; I have been engaged in litigations involving a large amount of property.

Q. Is not your scale of charges, in this case, based upon the charges which are frequently made in cases of the description referred to in the last interrogatory?

A. Not exclusively; it is based upon what is usual in 2936 cases of great importance, which do not exclusively involve pecuniary interests, as well as where pecuniary interests are involved.

Q. Are these the scale of charges usually made by yourself, in cases involving large pecuniary interests, and which have been referred to in previous interrogatories?

A. The scale is very nearly the same; I should think about a general average.

WM. CURTIS NOYES.

Adjourned to July 1st, at 10½ o'clock, A. M.

JULY 26TH, 1857.

PARTIES PRESENT.

THOMAS C. CORNELL, *for plaintiff*:

2937 My residence, Yonkers, Westchester county; I am a civil engineer; I know the Fonthill property which was sold by defendant to the Sisters of Charity of St. Vincent de Paul.

Q. Did you take any part in negotiating the sale of that property, and if so, what?

A. I brought the parties together.

Q. What price did Mr. Forrest ask for the property?

A. He asked \$100,000.

Q. Were you present when the negotiation was closed?

A. No, sir.

Q. Are you acquainted with certain other lands belonging to Mr. Forrest in Yonkers, which was not 2938 included in the sale aforesaid?

A. Yes, sir.

Q. What is the quantity of land thus left in the hands of Mr. Forrest?

A. I do not know with accuracy ; I believe between 30 and 40 acres.

Q. Can you name a number of acres which you know to be the lowest statement of quantity, or which the quantity exceeded?

A. I do not know the quantity ; I never surveyed it.

Q. Please to look upon the paper shown to you, and numbered Exhibit No. 3, being an exemplification of a deed from James Valentine and others to Edwin Forrest, and say whether you are acquainted with the premises described in that deed?

A. That appears to be a description of the premises belonging to Mr. Forrest, but whether it is the whole or not I cannot say yet ; it is not easy to trace out the description without the map ; I can say it is a deed of part of the premises, and, I think, of only a part.

Q. Did you learn from Mr. Forrest, at the time of these negotiations for the sale of the Fonthill property, or at any other time, how much land he had at that place besides the Fonthill property that was sold to the Sisters?

A. I have an impression, but no certain recollection, how much there was ; he told me how much, but I don't remember certainly.

Q. According to your best recollection, what did he state the amount to be?

A. I think it was 38 acres.

Q. Did Mr. Forrest name to you, about the time of said negotiation, how much an acre he considered that land worth?

A. Yes, sir ; two thousand dollars an acre.

Q. What did you consider it fairly worth?

A. Two thousand dollars an acre.

Q. Do you own land in the vicinity, and how long have you lived there?

A. I have lived at Yonkers 12 years, and I own land adjoining both these properties.

2941 Q. Have your opportunities been such as to make you acquainted with the values of land in that town?

A. Yes, sir.

Cross-examined:

Q. What have those opportunities been?

A. As a surveyor, I have known the price of a majority of the land sold in the town the last ten years, I suppose.

Q. Was that personal knowledge, or knowledge derived from information?

A. It was both; but in a majority of instances, of course, from common report.

Q. Are the estimates which you have given, as to the value of Mr. Forrest's land, founded on their value
2942 for agricultural purposes, or in reference merely to the price which you think might be obtained for them, or what is really the basis of those estimates?

A. Not what it is worth for agricultural purposes, but what I suppose it will sell for for fancy places.

Q. Can you state, as matter of knowledge, that Mr. Forrest's land in Yonkers, exclusive of what was conveyed to the Sisters, exceeds in quantity twenty-four acres?

A. It is hard to say; I suppose I must say I do not.

Q. In the statements made by Mr. Forrest to you, for what purpose was he addressing you?

A. In order that I might offer the property to the
2943 Sisters.

Q. Do you mean both pieces of property?

A. They had their choice.

Q. Did you tell the Sisters, or any one in their behalf, what you believed to be the value of the property, or suggest or advise what should be given for either or both?

A. I told them that the land then was worth \$2,000

an acre ; I told them at first that I thought possibly Mr. Forrest might take a little less rate for Fonthill, as in fact he did.

Q. In what you did, or said, about Mr. Forrest's property, as you have stated, did you act as agent for him, or the Sisters ?

A. For him.

2944

Q. And not for them ?

A. No more than one acts for the buyer in any case in which he tries to sell the property.

Q. What number of acres was included in Fouthill ?

A. It was called fifty, it slightly exceeded that amount.

Q. What did Mr. Forrest get for it ?

A. I can only give common report.

Q. Can you state the costs of the improvements put on that property by Mr. Forrest ?

A. I can make a guess of it ; he spent thereon, I presume, independently of the land, between fifty and seventy-five thousand dollars ; this is only a guess, how-
ever. 2945

Re-direct :

Q. How much, according to your best judgment, did that expenditure enhance the value of the property for the purpose of sale ?

A. A part of that expenditure increased its salability, but not more than one-half, if that.

Re-cross :

Will you give a thousand dollars an acre for Mr. Forrest's land, at Yonkers, which he now owns ?

A. Yes, sir.

THOS. C. CORNELL.

CHARLES W. BAKER, *for plaintiff :*

2946

Q. Please to state your residence and occupation ?

A. 158 Madison avenue, New York ; stationer.

Q. How long have you resided in the city of New York ?

A. I was born in the city and have always resided in it.

Q. Are you a man of family, and do you keep house in the city of New York ?

A. Yes, sir.

Q. How long has that been the case ?

A. For the last 14 years.

2947 Q. Are you acquainted with Twenty-second street, in the city of New York ?

A. I know where it is.

Q. As a man of family, keeping house, have you a knowledge of the expenses of living in the city of New York ?

A. Yes, sir.

Q. What would it cost a lady, of middle age, to live in the city of New York, in a neighborhood corresponding to Twenty-second street, keeping house, dwelling therein, and dressing in a reasonable and comfortable manner ?

Objected to, as irrelevant.

Objection overruled ; defendant excepts.

A. I should say in the neighborhood of \$3,500 per 2948 annum.

Cross-examined :

Q. Do you know Mrs. Forrest ?

A. I do not.

Q. Have you ever, except in reference to this case, given an estimate as to what it would cost for a lady to maintain herself for a year ?

A. I have not.

Q. In your estimate, what sum do you allow for rent, and what sum for clothing per year ?

A. From \$1,000 to \$1,200 for rent, and about \$750 allowance for clothes or dress.

Q. And for what object do you allow the difference 2949 between \$1,950 and \$3,500 ?

A. Servants, \$225 ; marketing, \$600 ; groceries, \$800 ; fuel, \$100 ; gas, \$80.

Q. Have you given the particulars in your last answer from a paper which you hold in your hand ?

A. I have ; yes, sir ; a memorandum made by myself.

Q. When was it made ?

A. About an hour ago, sir.

Q. Was your estimate founded on your own experience in the expense of housekeeping ?

A. In proportion to my own expenses.

Q. But is made in reference to Mrs. Forrest ? 2950

A. It was made in reference to Mrs. Forrest or to any other lady who had to be provided for in a genteel manner.

Q. How many servants did you allow ?

A. Two, sir.

Q. The cook and chambermaid ?

A. Yes, sir.

Q. Did you consider that the lady was to entertain guests suitable to her condition in life, and that her table was to be supplied with wine ?

A. I did expect she would entertain a few friends, but not with wines.

Q. What, if any, did you adopt as to the average price of a dress for a lady ? 2951

A. I made no minute calculation for that.

Q. Do you know how many yards there are in a lady's dress ?

A. I do not, sir.

Q. Was your estimate made on the supposition that she was to hire a furnished house ?

A. No, sir.

Q. Then in your estimate the cost of furniture and its wear and tear are entirely excluded, is that so ?

A. Yes, sir.

Q. What description of house had you in your mind ?

A. A three or four-story house, in a good neighborhood. 2952

Q. Did you ever see the house which Mr. Forrest occupied in Twenty-second street ?

A. I never knew which house he occupied.

Q. What is the price per week or month for the board, washing, and lodging of a lady in Mrs. Forrest's condition of life, at a first-class private boarding house ?

A. I don't know, sir.

CHARLES W. BAKER.

Plaintiff, with the understanding that the pleadings and judgments are before the referee, rests.

2953 Defendant's counsel offers Mr. Forrest as a witness.

Objected to. Objection overruled.

Plaintiff excepts. Witness sworn.

EDWIN FORREST :

Q. State of what your property consists, its nature, location, and value.

[The two passages underlined objected to by plaintiff as hearsay. Question by consent waived. A. C. B.]

A. I have about 48 acres of land in and near Covington, Kentucky, *which, so far as I can learn from recent questions relative to its value, is worth about \$400 an acre ;* I have some property also in the city of Cincinnati, at
 2954 *the corner of Ninth and Main streets, which, I have been told by a competent judge, has greatly suffered by deterioration in price within the last eight years, and that, if it were now sold under the hammer, it would bring about \$15,000 ;* I have also an interest in the Fonthill property in a mortgage of \$75,000 ; I have 24 acres of land adjoining Fonthill, and something beyond that, which I presume, from what the gentleman said this morning, is worth about \$1,000 an acre ; the property which I sold in this city, on Twenty-first and Twenty-second streets, between the Ninth and Tenth avenues, brought, I think, \$55,350, if my memory is correct, sold by Mr. Bleeker ;
 2955 there is another lot in the village of Yonkers, worth, I think, about \$400 ; there is a house and about three acres of land in New Rochelle, Westchester county,

which I sold for \$5,000, I think ; I can't think of any other real estate.

Q. What did you pay for the Covington property ?

A. I paid less than \$200 an acre for the bulk of it ; there was an after purchase of about two acres, for which I paid more than \$200.

Q. What did you pay for the Cincinnati property ?

A. For the land \$6,000, and the tenements I think 2956 about \$12,000.

Q. What price in all did you receive for the Fonthill property ?

A. \$95,000.

Q. Did you retain all that ?

A. I paid to my sisters the sum of \$40,000, from whom I borrowed money to build Fonthill, and part of the \$40,000 was applied to the erection of buildings on 21st and 22d streets, Chelsea.

Q. What amount did you expend in improvements on the Fonthill property before you sold it ?

A. In the neighborhood of \$90,000.

Q. Are you acquainted with the value of property at or near Yonkers ? 2957

A. I am not.

Q. About what in all was the value of your estate, real and personal, of every description ?

A. I should say about \$260,000.

Cross-examined :

Q. When did you buy the first lot of the Covington property ?

A. I think it was 1839.

Q. When did you make the second purchase of the two acres ?

A. It might have been in the same, or the following year.

Q. When did you purchase the land in Cincinnati ? 2958

A. I can't tell.

Q. Can you say about what time that purchase was made ?

A. I think, I may venture to say, anterior to 1834.

Q. What was the quantity in front on Main street ?

A. About 40 feet.

Q. What was the front on Ninth street ?

A. I think 90 feet.

Q. Did any part of the land front on any other street, except those two ?

A. No other street.

2959 Q. What buildings did you erect on this Cincinnati property, and on what streets did they front ?

A. Four stores ; two fronting on Main street ; two on Ninth street ; the stores on Main street were the largest stores.

Q. State, as nearly as you can remember, the width, the depth and the number of stories high, of the two Ninth street stores ?

A. I suppose they are 20 feet front each ; I don't know the depth ; I think, originally, they were two stories, those stores on Main street, but another story has been added since, I think.

Q. What, according to your best present recollection, 2960 was the depth of each of those two stores of Ninth street ?

A. I have no recollection at all about it.

Q. Did you ever see them ?

A. I have.

Q. How long ago did you last see them ?

A. In 1848, I think.

Q. How deep was each of the lots running back from Ninth street ?

A. I don't know, but I presume they must have gone back 40 feet, the full width of the front.

Q. Did the stores fronting on Ninth street, or either and which of them, cover the whole 40 feet in depth ?

A. I don't recollect ; there might have been a small 2961 space in the rear ; I don't recollect.

Q. Did you ever see the rear of those Ninth street stores ?

A. I don't remember.

Q. Were you ever inside of them ?

A. I may have been inside of the stores on Ninth street ; I don't remember.

Q. Have you no recollection whether or not you were ever inside of the stores on Ninth street ?

A. I may have been ; I think it very likely I have, but I do not distinctly remember ; I do distinctly remember being in the other two. 2962

Question repeated.

A. I do not recollect ever having been inside of those stores.

Q. Were those Ninth street stores built for you by contract ?

A. They were.

Q. How deep did your builder undertake to make them ?

A. I don't know.

Q. Was it as much as 10 feet ?

A. Yes.

Q. Was it as much as 20 feet ?

A. Yes.

Q. Was it as much as 30 feet ?

A. I think it might have been ; yes, sir.

Q. According to the best of your present recollection, 2963 was it as much as 30 feet ?

A. I have answered that before, by saying that I presumed they ran back the whole depth of the lot, which was 40 feet, with the exception, as I said before, of a little space ; I do not recollect ; I was not there when they were built.

Q. Of what material were those stores—brick or stone ?

A. Brick.

Q. What was the width, depth and number of stories of the two stores on Main street ?

2964 A. I have answered that question before, by saying that they were two stories high, originally, but one story has been added ; they are 20 feet front each and three stories high now, I think ; I don't know the depth.

Q. You have been inside those stores on Main street ; I now ask, according to your best recollection, about how many feet deep are they ?

A. I have no recollection at all about it.

Q. Are they 10 feet deep ?

A. I presume they are.

Q. Are they 20 feet deep ?

A. I presume they are.

Q. Are they 30 feet deep ?

A. I presume they are.

2965 Q. Are they 40 feet deep ?

A. I presume they are.

Q. Are they 50 feet deep ?

A. I presume they are.

Q. Of what material are those stores on Main street ?

A. Made of brick.

Q. Were all four of those stores built at the same time, or about the same time ?

A. I believe so.

Q. About what year was that ?

A. I do not know.

Q. Were they built before or after your first Covington purchase ?

A. I do not know ; I have a very poor recollection of dates and times.

2966 Q. Can you remember whether they were built before or after your marriage ?

A. No.

Q. Did you ever make any purchase of land in Yonkers from any person or persons named Valentine, except the one purchased of twenty-three to twenty-four acres ?

A. Yes.

Q. When did you make that other purchase ?

A. I don't remember.

Q. How much land was included in that other purchase ?

A. I don't recollect ; I bought it for my sisters, who 2967 hold it in their names.

Q. Was there as much as ten acres in that purchase ?

A. I think not ; I think there was less than eight.

Q. Was there as much as seven acres ?

A. I think there was, but I will not be sure ; I could not tell whether it was six, seven or eight.

Q. Was that purchase before or after the commencement of this suit ?

A. I don't recollect ; I think it was after.

Q. About how many years back was it, according to your best recollection ?

A. I have no recollection ; I think it was after the purchase of the twenty-four acres ; I am sure it was. 2968

Q. How much did you pay for that purchase ?

A. I don't know ; I gave \$600 an acre, I think.

Q. Did you pay for that in cash, or by a check ?

A. I paid for it, which was perfectly satisfactory to the seller.

Question repeated.

A. I don't know.

Q. Did you pay for it by delivering money to the seller ? Answer that.

A. I don't know ; don't remember.

Q. According to your best present recollection, did you pay it in one or the other of the two modes stated ; by cash or by check ? 2969

A. I have no recollection ; nor do I know whether I paid for it all at the same time, or at several times.

Q. Have you no present recollection whether you paid for that land, or any of it, in money ?

A. No ; I have no recollection about it, nor have I any idea that it was done by a check, but it was done very satisfactorily.

Q. At what place and to what person did you pay for that land ?

2970 A. I don't remember.

Q. Do you not remember to what person you paid for it ?

A. I presume it was to Mr. Valentine, jr. or senior, but to which I do not know, or whether I paid it to the attorney.

Q. Have you no recollection of the place where you paid any of the consideration for that land ?

A. No.

Q. When and where did you borrow from your sisters the sum mentioned in your direct examination ?

A. Through a series of years ; in Philadelphia, of course.

2971 Q. When obtaining this money from them, did you give them any note or voucher ?

A. No ; the money I gave to them, made by own industry, and borrowed from them when I needed it, and paid it back to them ; there was no inheritance of money.

Q. When borrowing this money from them, did you make or keep any entry or memorandum of the amount received from them ?

A. No, I never forget when I owe money.

Q. Did you never, in any instance, when you received any of these borrowed moneys from your sisters, make
2972 any entry of the amount, or date, or other particular of the transaction, in any book or memorandum ?

A. Never.

Q. Can you now remember any sum which you thus borrowed from your sisters, or either of them ?

A. I recollect \$15,000 at one time ; the reason for my recollecting that is, because I sold that amount of stock belonging to them ; that belonging also to my mother.

Q. What stock was that ; through whose agency, and to whom did you sell it ?

A. The stock was Philadelphia, perhaps, water stock ; but I do not remember. 2973

Q. Did you sell it yourself, or through an agent ?

A. Through an agent ; I never sold stock myself ; I do not recollect the agent.

Q. Was it all sold at one time ?

A. I believe it was.

Q. Was the sale made in New York or Philadelphia ?

A. In Philadelphia.

Q. Where did you receive the money ?

A. In Philadelphia, I believe ; I will not be sure.

Q. Did you receive it directly from the hands of your mother, or sisters, or either of them ?

A. I don't remember.

Q. Who employed the agent who sold this stock ? 2974

A. I don't recollect.

Q. Were the certificates or evidences of this stock ever in your hands ?

A. I don't recollect.

Q. About what time did you receive this sum ?

A. I don't recollect.

Q. Can you say whether it was before or after the year 1840 ?

A. No.

Q. Can you say whether it was before or after the year 1836 ?

A. No, sir.

Q. Can you say whether it was before or after the year 1845 ? 2975

A. No ; I have already answered that question ; it was while I was building my houses on Twenty-second and Twenty-first streets, and at Fonhill ; the whole \$40,000 was received and expended through a series of years.

Q. Was this \$15,000 received after you purchased the Fonhill property ?

A. I think it was before, because that was among the first of my borrowings ; it might have been in purchasing the house in Twenty-second street—my dwelling-house which I bought, and did not build.

2976 Q. Can you specify or name any other sum besides this \$15,000, which you borrowed at any one time ?

A. I cannot.

Q. Can you name or specify the form in which you received any other sum, whether in stock, by check, by cash, or any other medium ?

A. It was usually in stock ; I do not recollect any checks ; the stocks I had the whole control of myself.

Q. Did you ever receive any sum from them, or either of them, otherwise than in stocks ?

A. I don't remember.

Q. Do you mean that you don't remember whether you did or not ?

2977 A. No ; I don't remember ; may have received money from them ; don't remember.

Q. Did you ever, to the best of your present recollection, receive any part of this borrowed money from your mother or sisters, or either of them, in any other form than in stocks ?

A. I do not remember ; I have no recollection of receiving any money.

Q. Have you any recollection of ever having received any part of this borrowed money from your mother or sisters, or either of them, in any other form than in stocks ?

A. I have no present recollection about it.

2978 Q. Question repeated.

Ruled that the question is answered. Plaintiff excepts.

Q. Besides this \$15,000 worth of stock, can you specify any other particular stock which formed part of this borrowed money ?

A. No ; I only recollect the other because there was some difficulty about it, the voucher being lost.

Q. Were the certificates or vouchers of the \$15,000 ever in the personal possession or custody of your mother or sisters, or either of them ?

A. I don't recollect ; I think they were.

Q. Which of them ever had the possession or custody 2979 of those certificates or vouchers ?

A. I don't know.

Q. Were those certificates or vouchers ever in your possession ?

A. Certainly ; all in my possession ; I gave them to them ; I said before, I had control of those matters ; when I went home and wanted money, I took those certificates of stock without saying any thing to them, and sometimes I would.

Q. Did you originally purchase with your own money those vouchers or certificates for that \$15,000 worth of stock ?

A. I have already said, or in words to that effect, that 2980 all the money belonging to my family was made by my own industry and unassisted efforts ; it was with my money ; I don't know who made the purchase ; they might have been purchased by Mr. Lardner, late president, or cashier, of the United States Bank.

Q. Were they purchased by yourself personally ?

A. I don't know that I ever bought any stocks personally.

Q. Were they purchased by a broker or agent, at your request ?

A. I don't remember.

Q. Had your mother, or your sisters, or either of them, 2981 any agency in purchasing that \$15,000 of stock ?

A. I don't remember.

Q. Did that \$15,000 of stock stand in your name ?

A. I have no recollection.

Q. Did any part of it stand in the name of your mother or sisters, or any of them ?

A. I have no recollection.

Q. Did any stocks, which you gave to your mother or sisters, ever stand in the names of any of them ?

A. I have no recollection.

2982 Q. Where were the certificates or vouchers for the stocks which you gave your sisters or mother, or borrowed from them, kept during the time they owned them ?

A. During my mother's lifetime, they were in her possession sometimes and sometimes in my own.

Q. When in her possession, in what place of security were they kept ?

A. Kept in a tin box.

Q. Were any other papers or valuables kept in that tin box ?

A. All that she considered valuable besides the stocks, some trinkets, &c.

Adjourned to 23d July, 1859, at 10 A. M.

JULY 28TH.

2983 SAMUEL S. SMITH, *sworn for defendant* :

Q. Where do you reside ?

A. At Clifton, Ohio.

Q. What is your occupation ?

A. In the mercantile business.

Q. Do you know Mr. Forrest, and how long have you known him ?

A. Yes ; for over 30 years.

Q. Are you acquainted with the real estate owned by him, at the corner of Main and Ninth streets, in Cincinnati, and at Covington, Kentucky ?

A. Yes, sir.

Q. When did Mr. Forrest acquire that property—state as to each parcel ?

A. As near as I can recollect, the property on the
2984 corner of Main and Ninth streets was acquired in 1834 ; the lot fronts on Main 40 feet, running back 130 feet ; part of that lot, 90 feet on Ninth street, and 40 feet on

Main, was acquired some short time before the 40 remaining feet on Ninth street.

Q. State what improvements were made on the property after Mr. Forrest acquired it, and when they were respectively made?

A. I think the improvements on the whole lot were made in 1844; the building was three stories, covering the whole of the ground; of brick; divided into four stores, two fronting on Main and two on Ninth; those on Main being 20 feet front each, and those on Ninth the same; one of the Main street stores being 90 feet in depth, and the other about 80; those on the Ninth were, one of 40 feet, the other about 35, as near as I can recollect.

Q. Did you act as the agent of Mr. Forrest in regard to that property? if so, when did the agency begin? how long continue? and what was its nature?

A. I received a power of attorney of Mr. Forrest to act as his business agent about 1836, and I have continued acting as such ever since; the agency was, to receive rents, keep in repair, and attend to his property generally in Cincinnati.

Q. What did the property and improvements respectively cost?

A. The lot corner of Main and Ninth, 40 feet by 90, cost \$6,000; the lot on Ninth, of 40 feet by 40, cost, as near as I can recollect, \$1,500; the buildings with an addition of one story, some years after, cost say \$12,800, as near as I can remember.

Q. What rent has the property yielded, and does it now yield, gross and net?

A. The average rent will have yielded net \$1,500 per annum.

2987

Q. Has real estate in the vicinity of Mr. Forrest's property in Cincinnati risen or fallen in value within some years past?

A. I think it has depreciated in value at least $33\frac{1}{2}$ per cent., if not 50, during the last six or eight years.

Q. What is the present value of that property, and for what is it now rented?

2988 A. The property, I think, might bring in market \$15,000, and not more, and is now renting for \$1,450 per annum, netting, after taxes are paid, about \$1,200.

Q. How long have you been acquainted with the Covington property?

A. Some 40 years.

Q. Describe it?

A. The property lies on the west side of Covington; a small portion has lately been taken into the city limits; it has a small cottage and barn, or stable, upon it, and there are some 47 and a fraction of acres; it is occupied by a German, who was placed there to take care of it; he was placed by Mr. Forrest in 1848, I
2989 think, to take care of it; I obtained the man for Mr. Forrest.

Q. Since 1848, about how often per year or month have you visited Covington?

A. I have been in the habit of visiting Covington sometimes once a week, sometimes once a month, seldom less often.

Q. How far is it from Cincinnati?

A. It is immediately across the river, say three-fourths of a mile.

Q. Are you acquainted with the value of Mr. Forrest's property in Covington? If so, what is that value?

2990 A. If Mr. Forrest's property was forced to sale, I think it would not bring over \$20,000; what I have stated is to the best of my judgment, founded on what I know of property there.

Q. Has it ever, to your knowledge, yielded to Mr. Forrest any rent or income?

A. Mr. Forrest has been the recipient of perhaps

\$300 or \$400, during the whole term of his ownership, from proceeds of a small vineyard on the place; I mean \$300 or \$400 in all.

Q. How much did Mr. Forrest pay for that property per acre?

A. I think he paid from one hundred and fifty to one 2991 hundred and seventy dollars per acre for all but about three acres, which cost him some \$400 per acre.

Q. What did the improvements upon it cost?

A. I think I had them built by contract for \$1,000.

Q. Have you been Mr. Forrest's agent in respect to that property ever since 1848?

A. Yes, sir.

Cross-examined:

Q. When was the first parcel of the Covington property purchased?

A. I think in 1839.

Q. When was the second purchased?

2992

A. The same year.

Q. You have stated the whole quantity at forty-seven acres and a fraction; do you know the quantity with accuracy, either from survey or recollection of the description in the deed?

A. My impression is derived from a plot which I have seen; I may be slightly wrong.

Q. For whom was this plot made?

A. I think for Mr. Ludlow, the former owner.

Q. In what way did it represent the property? as laid out into town lots? or how?

A. As a tract of land, not as lots.

2993

Q. Does this piece of land extend down to the river?

A. No, sir.

Q. How far back from the river is the front of it?

A. I could not say with accuracy, but several hundred feet from high water mark.

Q. At about what time was the fourth story added to the Cincinnati stores?

A. I could not state with accuracy without papers and my books; I think within seven years from the present time.

Q. Were you in the city of New York in the year 2994 1851?

A. I cannot say with certainty.

Q. Have you been in the city of New York more than once since that fourth story was added?

A. I think I have.

Q. How often have you been in the city of New York, since that fourth story was added?

A. I cannot say.

Q. Did you see Mr. Forrest in Cincinnati, in the year 1848?

A. I presume I did.

Q. Was that fourth story added before, or after that?

A. I think after.

2995 Q. About how long after?

A. I cannot answer positively; my impression is, about three years.

Re-direct:

Q. What is your age?

A. Fifty-five, last August.

SAMUEL S. SMITH.

WARREN LELAND, *sworn for defendant:*

Q. Are you one of the proprietors of the Metropolitan Hotel, in Broadway and Prince street, in the city of New York? And how long have you been such proprietor?

2996 A. I am, and have been ever since September, 1852.

Q. Of what class is that hotel? And in what style is it furnished and kept?

A. It is a first-class hotel; very handsomely furnished and kept, as well as any hotel can be in New York.

Q. For how much per week may a lady obtain in that hotel a spacious and well appointed apartment,

with board, lodging, lights, fuel, attendance and the comforts of the house?

A. Seventeen dollars and a half a week, for room, board, lodging, attendance, fire and lights.

Q. Are there permanent boarders in that hotel who 2997 are residents in the city of New York?

A. Yes, sir.

Q. Amongst them are there ladies?

A. At the present time there are not single ladies.

Q. How as to married ladies?

A. Yes, sir; there are some one or two families there now.

Q. Has it been usual in the city of New York, for some years past, and is it now, for New York families to reside and have their homes in hotels?

A. Yes, sir; that is a principal business of some of the up-town hotels, and a large portion of our business during the winter. 2998

Cross-examined:

Q. What apartments, as to number and size, would be allotted to the "one weekly boarder," to whom, as a specimen, you have referred?

A. One chamber—a good, fair-sized—a medium-sized bedroom.

Q. What accommodations in the way of parlor or parlors would such boarder enjoy?

A. Free use of all our public parlors.

Q. Where would she take her meals? at a public or a private table, or at what table?

A. At the public table.

Q. Would washing be included?

A. No, sir. 2999

Q. When you speak of attendance, do you mean to include any personal attendance, such as a ladies' waiting-maid bestows?

A. No, sir.

Q. If any person visited the boarder, and was invited

to take a meal with her, would that be a distinct charge?

A. Yes, sir.

3000 Q. Would the price named entitle the boarder to any use of a carriage, in going out on any occasion?

A. No, sir.

Q. Suppose you furnished the boarder alluded to a handsome private parlor, such as you furnish in winter to respectable families, together with a suitable adjacent bedroom, and that she had her meals in her own parlor, according to the usual requirement of such families, with the attendance, lights and fires requisite for these purposes, what, according to the usual rates which you charge, would be the charge per week?

A. About 75 dollars.

3001 Q. Would this charge include washing, or carriage, or waiting-maid's attendance, as before alluded to?

A. No, sir; nothing of that kind.

WARREN LELAND.

Witness, on being recalled, states:

"I desire to make some corrections founded upon reflection and on the examination of some memoranda. The first is, I had entirely overlooked a piece of property of which I am the owner, lying in the fields near the city of Philadelphia; I do not know whether it has been transferred to me in due form, but I consider myself the owner, and its value is about \$400; I also desire to
3002 state, that when I said my entire property was of the value of \$260,000, I not only included the mortgages upon the Fonthill property and the property in Chelsea, on a portion of the property already sold and now belonging to others, so that Chelsea, Fonthill, New Rochelle, Fonthill addition of 24 acres, the Cincinnati property and the Covington will amount to \$170,400—with this correction, my whole estate will amount to \$176,800; another correction—I think I stated that the improvements on Fonthill cost in the neighborhood

of \$90,000; I meant in that statement to include the 3003 original purchase-money of the property; I believe that is all I have to say."

Cross-examination continues:

Q. Please to state separately, item by item, with the value which you estimate in each instance, the items specified, so that it may appear how you make out this aggregate of \$176,800?

A. Mr. Salmon, of Chelsea, a mortgage of a house for \$4,500; T. B. Coddington, a mortgage of another house, \$3,600; another house by the same, a mortgage of \$4,000; J. G. Cameron, a mortgage of \$2,500—originally it was for \$4,500, of which \$2,000 has been paid; 3004 J. & E. Cameron, a mortgage now of \$2,000—having paid \$1,600 of the original mortgage; H. Beals, a mortgage, \$4,400; H. Beals, again, \$4,900; B. F. Pistor, a mortgage of \$7,500; Charles Wright, of New Rochelle, I suppose, \$3,000; Fonthill, a mortgage of \$75,000 by the Sisters; and the Cincinnati property I rated at \$15,000, Covington property \$20,000—the addition to Fonthill of 24 acres; I take the valuation put upon it the other day, \$1,000 an acre; I have in the Bank of Yonkers stock to the amount of \$1,000; I have personal property, including my wardrobe, theatrical, some books 3005 and pictures, which I set down at a large price, \$5,000; the Philadelphia lands I had forgotten, at \$400; that is all that I remember now.

Q. Are the several mortgages, mentioned in your last answer, preceding the mortgage of Mr. Wright, those which were taken by you for portions of the purchase-money on the sale of your property in Twenty-first and Twenty-second streets, through Mr. Bleecker?

A. They are.

Q. Have these mortgages, or any of them, ever been assigned by you to any body, or given, or sold, or trans- 3006 ferred to any body?

A. Never.

Q. Can you produce any one of those mortgages?

A. I can produce them all; not now, but in five minutes or ten.

Q. Look upon the paper now produced, and being an exemplification of a mortgage from Thomas B. Coddington to you, and say whether that is, in respect to the special arrangements touching the dower of the plaintiff, substantially like all those mortgages?

3007 A. I don't know; I can't tell.

The witness is handed the paper and glances at it, and says: I would like to hear one of them read, and compare the others with it; I don't know what is in them.

(Paper marked.)

Q. What disposition did you make of the other portions of the purchase-money received by you on the sale of the houses and lots on Twenty-first and Twenty-second streets, in the city of New York?

A. I don't know that I am bound to answer that question.

3008 Counsel for plaintiff insists on an answer. Referee decides that witness is bound to answer.

Witness then says, "I used it in paying my debts."

Q. To what person, or persons, as creditors, did you pay it.

A. To my sisters; I returned borrowed money, from the sale of the Fonthill property, and from the sale of the others.

Q. How much money did you so return to your sisters?

A. The bulk of it; indeed, I may say the whole of it, with the exception of the money which I paid for 3009 them, for the eight acres at Yonkers.

Q. In what sums and at what times did you thus pay the bulk of this money to your sisters?

A. I can't specify the sums, nor the times.

Q. Can you name any one sum, being part of these proceeds, which you paid over at one time to your sisters, or either of them?

A. There was a property that I bought for them, and is now in their name, or in the name of one of them, in Thompson street, I think, New York, and I don't remember the price, probably about \$6,000 or \$4,000; I can't tell which.

3010

Q. In whose name is that?

A. I can't tell in which of them.

Q. When did you purchase that? Was it before or after you sold the Chelsea and Fonthill property?

A. After.

Q. Can you produce the deed for that property?

A. I think I can; it is in Philadelphia, I think.

Q. With what person did you conduct the negotiation for that property?

A. William Ward, formerly of the firm of Bleecker & Co., auctioneers.

Q. Was the negotiation conducted in New York? 3011

A. It was.

Q. Was either of your sisters in New York at the time?

A. No.

Q. Who acted in the negotiation on the part of the purchaser?

A. I told you, Mr. Ward.

Q. Had either of your sisters any direct conversation or correspondence with him, that you know of?

A. Not that I know of.

Q. Who employed him to act in the business, on the part of the purchaser?

A. I.

3012

Q. Has either of your sisters ever seen that property, to your knowledge?

A. Not to my knowledge.

Q. Who attends to the collecting the rents?

A. Mr. Ward—or, at least, I get the money through him; I think he employs some one else to get the money immediately from the tenants.

Q. Can you name any other specific sum, being part of the proceeds of the Chelsea or Fonthill property, or both, which you paid over at one time to your sisters, or either of them?

A. Yes.

3013 Q. Name the sum, and state to what person you paid it?

A. I don't know the person; I paid it for their dwelling-house—the house in which they now reside—about \$30,000.

Q. Where is that house situated? Give the street, number, town, or city?

A. At the corner of Master and Broad streets, in the city of Philadelphia.

Q. Was that property purchased before or after the sale of the Chelsea and Fonthill property?

A. I think it was purchased after.

Q. Do you certainly remember that?

A. I do not, but I am almost sure.

3014 Q. Have you the title-deed for that property?

A. My sisters have.

Q. Give the names, or name, of the sisters to whom it is conveyed?

A. Henrietta, Caroline, and Eleanora Forrest.

Q. Who conducted, on the part of the purchasers, the negotiation for the purchase of that property?

A. The deeds were drawn up by Mr. Weatherby, a Commissioner of Philadelphia.

Question repeated.

A. There might have been several; I might have done it.

3015 Q. What did you do in the way of negotiating, or effecting that purchase? State all that you did?

A. There was a certain sum of money asked for the property, about \$30,000, and was paid to the original owner; I paid the money to the Commissioner; it was paid in two or three different times; I don't remember

the sums; it was all paid; let me state that, in the purchase of this property, six thousand dollars was paid from the sale of a house which belonged to my mother and my sisters; that house was 144 North Tenth street, 3016 Philadelphia, which my mother lived in for twenty-five years.

Q. Did you do any thing else in the way of negotiating or effecting the purchase of that house at the corner of Master and Broad streets, except paying the money for it?

A. I suppose I had various conversations, such as are usually had when the sale of any property is to be considered.

Q. Did you conduct, or superintend, or direct the negotiations, or any of them, for the purchase of that property?

3017

A. I suppose I did.

Q. Did any one else besides yourself, to your knowledge, conduct or superintend any such negotiations?

A. I have already said Mr. Weatherby, the Commissioner.

Q. Did any body else besides Mr. Weatherby and yourself?

A. I don't remember.

Q. Who employed Mr. Weatherby in that business?

A. I believe I did.

Q. Was the whole price paid without taking credit for any part by mortgage or any such security?

A. The money was paid by different installments, at 3018 two or three different times.

Q. Was any mortgage given for any part of the purchase money on the part of the purchaser?

A. I don't know about the mortgage; there were some instruments which were binding for the payment of the residue.

Q. What was the name of the owner or seller who executed the deed of conveyance?

A. I don't remember the name, I think it is William Gaul.

3019 Q. From the hand of what person did you receive the conveyance?

A. I presume from Mr. Weatherby.

Q. Did you see Mr. Gaul, or the owner, whoever he was, in the transaction?

A. I did.

Q. At the time you received the deed of conveyance, did any part of the purchase-money remain unpaid?

A. Of course.

Q. How much remained unpaid?

A. I don't know.

Q. Was the payment of that residue of the purchase-money secured to the owner by any documents?

3020 A. I have already answered that it was.

Q. Who signed the document?

A. I don't remember.

Q. Did you ever see it?

A. I don't remember; I presume I did.

Q. Was that document delivered at the same time that you received the deed?

A. I don't remember.

Q. Did any of your sisters sign that document?

A. I don't remember.

Q. Did any of your sisters sign any documents in respect to that purchase?

A. I don't remember.

3021 Q. Was the deed of conveyance for that property delivered to you before you conveyed the Twenty-first street, Twenty-second street, and Fonthill property?

A. It was after, I think; three years since the purchase was made, I think.

Q. Into whose hands did you pay the moneys paid for that Broad and Master street property?

A. I think it was paid in the presence of the Commissioner to Mr. Gaul.

Q. In how many installments ?

A. I am not certain ; two or three ; more than one, at any rate.

3022

Q. Can you specify the amount of any one of the installments which you so paid ?

A. I cannot.

Q. Can you specify the form in which you paid any one of those installments, whether by check, or bank bills, or other medium ?

A. I think the first was paid in a check on the Mechanics' Bank of New York, but I am not certain.

Q. State whether that was your own check, and about what was its amount, as nearly as you can ?

A. It was my own check, doubtless ; as to the amount I have no idea ; no present recollection.

Q. Was it as much as \$3,000 ?

3023

A. I have no recollection whatever ; if I may presume to speak, it was, I think, more.

Q. Was it as much as \$5,000 ?

A. I don't know.

Q. Have you no recollection whether it was as much as \$5,000, or not ?

A. If I had the recollection I would say so—I have none.

Q. Did you pay any other installment than that first one, before or at the time you received the deed ?

A. No, I think not.

Q. Can you remember the amount of any other installment paid by you on account of that purchase ?

3024

A. I don't remember that, or any other ; I don't remember any one.

Q. Did you pay as many as three installments on account of that purchase ?

A. I don't remember.

Q. Did you pay as many as two of those installments ?

A. There must have been two ; I said that before ; if there was more than one, there must have been two.

Q. As to any installment paid by you after the first, was it paid by check, or how otherwise?

3025 A. I don't remember.

Q. About how long after the conveyance was delivered to you did you pay the last installment of the purchase-money?

A. I have no recollection as to the time.

Q. Was it as much as a year after the conveyance was delivered?

A. I don't remember.

Q. Was it as much as two years after the conveyance was delivered?

Objected to, as immaterial, as in effect already answered.

3026 Objection sustained, on the ground that it has been answered, only.

Q. Was the last installment paid as much as six months after the deed was delivered?

A. I don't remember.

Q. Was it paid as much as three months after the deed was delivered?

A. I don't know; I think it must have been.

Q. How long before the deed was delivered did you make the agreement, or bargain, to purchase the property?

A. I don't remember.

Q. Was it as much as six months before?

3027 Objected to as irrelevant. Objection overruled. Defendant excepts.

A. I don't know; it was done in a comparatively short time; I think it might have been two or three weeks from the inception to the completion.

Q. Who now reside in and occupy that house?

A. My three sisters, whose names I have already mentioned.

Q. Is that house your own residence?

A. It is.

Q. You have mentioned a sale of a house in North Tenth street; who executed the conveyance in the sale of that house? 3026

A. I don't remember.

Q. Was it sold before, or after, you agreed to buy the other Philadelphia house?

A. It was about the time; it was sold with the view that the proceeds should be part of the purchase-money of the new house; on reflection, I think it was taken at a valuation by Mr. Gaul, as part of the purchase-money.

Q. Was not the deed of conveyance of that Tenth street house, on such sale, executed by yourself?

A. I don't know; it might have been by myself, or by my sisters and myself, conjunctively. 3029

Q. Did you execute that conveyance?

A. I do not know; I have no present recollection of it.

Q. Did any of your sisters sign or execute that deed?

A. I have no recollection.

Q. Did you originally, with your own money, purchase that Tenth street property?

A. Yes; it was the first earnings of my professional career, and I gave it to my mother.

Q. Did you take the title on such original purchase in your own name?

A. I believe I did.

Q. Did you or not, after your marriage, together with 3030 your wife, execute a conveyance giving some interest in it to your mother?

A. Yes.

Q. Was not that interest so conveyed an estate for her own life only?

A. I believe it was.

Q. At what time did she die?

A. I don't know.

Q. Was it not in or about the year 1847?

A. I do not know the year my mother died ?

Q. About how long before the commencement of this
3031 suit was her death ?

A. I don't know.

Q. Was it before the commencement of this suit ?

A. I don't know ; I presume my mother died before
the commencement of this suit.

Q. Did you ever execute any paper conveying to your
sisters, or any of them, any interest in that North Tenth
street property ?

A. No.

Q. Besides the sum paid for the Thompson street
house, the payment for the Yonkers property, and the
payment or payments for your present residence in
3032 Philadelphia, can you specify any other specific sum,
being part of the Chelsea or Fonthill property, which
you paid over to your sisters at any time ?

A. I made a part payment on a lot on the south side
of the property, at the corner of Broad and Master.

Q. How much was that payment and to whom did
you pay it ?

A. The payment was \$5,000 ; I paid it to a Philadel-
phia land company ; the name I do not recollect.

Q. To what individual did you pay it ?

A. I paid it to the secretary of the company, Mr.
Krooman.

Q. About what time was this payment ?

3033 A. Within the last year.

Q. Have you taken a conveyance of this property ?

A. Yes, to my sisters ; a part of the purchase-money
is unpaid ; I think \$2,500.

Q. In what way did you make that payment ? Was
it by check, or how otherwise ?

A. I think by check ; I think it was made in two
payments, each by check.

Q. Were these your own checks, and on what banks
were they drawn ?

A. On the Bank of Commerce in the city of Philadelphia, and the other on the Mechanics' Bank in the city of New York ; I think so.

Q. Can you name any other specific sum, being part 3034 of the proceeds of the Chelsea or Fonthill property, or both, which you paid over at any one time to your sisters or any of them ?

A. No ; there is no other payment.

Q. Did you personally conduct the negotiation, on the part of the purchaser, for that south-side property ?

A. I did.

Q. You have spoken of \$15,000 worth of stock given by you to some of your family ; when did you purchase that stock ?

A. I don't remember ; it was while I was a single man.

Q. You were in England in the year 1837, were you not ?

3035

A. Unfortunately I was.

Q. Did you then own the \$15,000 stock ?

A. I did, to the best of my recollection.

Q. Can you give the name of any person from whom you bought, or through whose agency you bought, the same, or any part of it ?

A. I think it was bought by Mr. Lowden, who was connected with the United States Bank either as president or cashier.

Q. Is he living, and, if so, where does he reside ?

A. I don't know ; it is a mere supposition, at any rate ; the name lives in my memory ; I think I mentioned it the other day.

Q. Is it a mere supposition that he bought it for you, or do you remember that he did ?

3036

A. I don't remember any thing at all about it ; I think he did ; he certainly purchased some stocks for me, and I think it was that stock, but won't be sure.

Q. Was the property at Chelsea all purchased after your marriage?

A. Yes.

Q. Did you keep a bank account in either New York or Philadelphia, between the time of your marriage and the commencement of this suit?

A. I did.

3037 Q. State in what banks you kept accounts during that period?

A. In the Bank of America in New York, and I think in the Mechanics' Bank in Philadelphia.

Q. Did you continue that bank account in Philadelphia after your marriage and your return to dwell in New York?

A. I don't know; after I became connected with this woman, I had that bank account.

Q. Did you continue that bank account, making deposits and drawing upon it, for as much as six months after you returned to live in New York subsequently to your marriage?

A. I don't remember.

3038 Q. Did you continue to keep your account in the Bank of America after the commencement of this suit?

A. I don't remember.

Q. Did you open your account in the Mechanics' Bank in New York before the commencement of this suit?

A. I don't remember; you can get that by applying to the bank.

Q. About how long did you keep an account in the Mechanics' Bank in New York?

A. I don't remember either when it began or any thing at all about it.

3039 Q. Had you, after your marriage, and before the commencement of this suit, an account in any other bank than that you have named?

A. I suppose I have; but I don't remember the names of them, certainly not in this city.

Q. In what bank or banks have you kept an account or accounts, subsequently to the trial of this cause, which closed in January, 1852?

A. In the Mechanics' Bank of New York, and in the Bank of Commerce in Philadelphia; they are the only ones I remember.

Q. In what bank did you make the deposit of the 3040 moneys received by you on the sale of the \$15,000 of stock?

A. I don't remember.

Q. In what bank did you deposit the moneys received by you for services rendered at the Broadway Theatre in New York, mentioned by the witness, Mr. Warren?

A. I don't know.

Q. What disposition have you made of those moneys?

A. I don't know; it is hard to tell.

Q. Can you not state what disposition you have made of any part of them?

A. No.

Q. During the six years next after the trial of this 3041 cause, did you pursue your profession, performing in other places besides the city of New York?

A. I presume I did until I was broken down by sickness, and the efforts made on the stage; I have not acted, I think, for two years, or more.

Q. In what cities, besides New York, were you in the habit of performing engagements during that period?

A. I don't remember; I have acted in Boston, Providence, Philadelphia, and St. Louis since that time.

Q. Were your receipts for such services in cities other than New York, during that period, large or considerable? 3042

A. I don't remember.

Q. Did your receipts for such services in cities other than New York, during that period, amount in the aggregate to as large a sum as your receipts during the same period for professional services in New York?

A. I don't know.

Q. Have you not made it a practice at all times since you returned to New York, subsequently to your marriage, to keep in memorandum books, or otherwise, an
3043 account of the moneys received and paid out by you?

A. I formerly did; I don't now, and have not for years, I think since 1850, kept any account.

Q. When did you begin to keep such account?

A. About the time I was first connected with this woman, I think.

Q. Did you continue to keep such account from that time until about 1850?

A. I believe I did regularly.

Q. Have you preserved such accounts?

A. I don't know; I have not seen or heard any thing about them since 1850.

Q. When did you last see them?

3044 A. I don't remember.

Q. Are they not under your control?

A. How should I know, when I tell you I have not heard any thing about them?

Q. Was this \$20,000, received of the Sisters, all received in one sum?

A. Yes.

Q. In what bank did you deposit that?

A. I think I received it from the Leather Manufacturers' Bank, and deposited it in the Mechanics' Bank in New York.

Q. When did you sell the New Rochelle property?

3045 A. I don't know; it was all sold, I think, at about the same time—Fonthill, Chelsea and New Rochelle properties; the same persons sold it; I think Bleecker.

Q. Did you, in 1848, own a library?

A. I did.

Q. Of about how many volumes did that consist?

A. I don't know; I never counted them.

Q. Had you not a catalogue?

A. I had, a very imperfect one.

Q. According to your best knowledge and recollection, did it amount to 10,000 volumes?

A. I can't tell you; I never counted them, and, therefore, don't know; there might have been 10,000 volumes, and there might have been more; I don't know.

Q. Have you got that library yet?

A. No.

Q. What disposition have you made of it?

A. I gave it to my sisters in October, the second day, 1850; a deed of gift of goods and chattels, that library also included.

Q. What else did you include in that deed of gift?

A. All my goods and chattels, in which, of course, I include my library.

Q. Where is that library now?

A. In the possession of my sisters, in the house at the corner of Broad and Master, Philadelphia. 3047

Q. What is the age of each of your sisters?

A. I don't know the age of any one of them; two are older than myself and one is younger.

Q. What is your own age?

A. I am over twenty-one; I was born in 1806, the 9th of March.

Q. What is the name of the sister who is younger than yourself?

A. Eleanora.

Q. By how many years is she younger than you?

A. I don't know.

Q. According to your understanding, and the information you have received as a member of the family, and your own observation, how much younger than yourself do you believe her to be? 3048

A. It is a matter about which I never desired any information, and never got any, and therefore know nothing about it.

Q. According to your best judgment, is she fifty years of age?

A. I might guess ; I should guess that she was about forty.

3049 Q. Is it your best judgment and belief that she is as much as ten years younger than yourself?

A. I don't know ; I should suppose that she was about forty ; that is my judgment and belief.

Q. How old was she, according to your best judgment and belief, at the time you bought the North Tenth street house ?

A. I don't know ; I can't tell any thing about it ; I have not the slightest remembrance, and can form no judgment about it ; I never gave it a moment's thought

Counsel for defendant asks that the examination be
3050 suspended, to take the testimony of a witness from a foreign State. Counsel for plaintiff desires that the testimony be completed, or at least read over, before that is done.

Referee decides to suspend the examination for that purpose.

JAMES McMAHON, *sworn for defendant :*

Q. What is your age, residence, and occupation ?

A. My age is thirty-five years ; I reside in Providence, R. I. ; my occupation is coachman for Mrs. Moses Ives, of Providence.

Q. How long have you been her coachman ?

3051 A. About six years.

Q. Were you at any time employed at the City Hotel in Providence ? and if so, from what time to what time, and in what capacity ?

A. I went in 1847 to that hotel, and hired as a waiter, and remained a year as waiter, and became porter, and remained there in all five years and eleven months.

Q. Do you know by sight Mrs. Catharine Forrest and George Vandenhoff, the actor ?

A. I think I would know Mrs. Forrest ; I know Mr. Vandenhoff very well.

Q. Did Mrs. Forrest and Mr. Vandenhoff at any time, and when, board at the City Hotel in Providence ?

A. I think it was in 1853 that Mr. Vandenhoff and 3052 Mrs. Forrest came there to the City Hotel, to fulfill a theatrical engagement in Providence ; that was the first time I had ever seen Mrs. Forrest.

Plaintiff objects to this evidence as irrelevant. Referee overrules the objection. Plaintiff excepts.

Q. How long did they continue to board at that hotel ?

Objected to, as irrelevant.

Objection sustained.

Q. What apartments did Mrs. Forrest occupy in that hotel at that time ?

Objection on the same ground.

Counsel for the defendant states that is one of a series 3053 of questions which he proposes putting, to show by the witness sexual intercourse between the parties above named, Mrs. Forrest and Vandenhoff, in the apartments occupied by her at that hotel in 1853.

The plaintiff's counsel claims that no such matter is in issue on this reference.

Objection sustained, and defendant excepts.

JAMES McMAHON.

FREDERICK BARTLETT CONWAY, *sworn for defendant* :

Q. Do you reside in this city ?

A. I do, and am an actor by profession.

Q. Are you a married man, residing and keeping 3054 house in this city ?

A. Yes, sir.

Q. When were you married, and how long have you kept house, and where ?

A. April, 1852 ; I kept house in Forsyth street ; subsequently in Second street ; subsequently in Noble street, Philadelphia ; North Eighth street, Philadelphia ; Walnut street, Philadelphia ; and at present at No. 30 East Twenty-fourth street, New York.

Q. How long have you kept house at your present

residence, and what persons have composed your family
3055 there ?

A. I have kept house from the first of May last, and my family is composed of myself, wife, wife's mother, two children, a niece and a nephew, and two servants.

Q. What kind of a house is that ?

A. A three-story and basement, I think you term it; I think it is stone.

Q. What rent do you pay per year ?

A. \$650 per year.

3056 Q. What is the weekly expense and cost of keeping that house, and maintaining yourself and the family you mentioned ?

Objected to, as irrelevant. Ruling waived.

A. \$40 per week ; that is an average.

FREDERICK BARTLETT CONWAY.

EDWIN FORREST, *recalled* :

His deposition, as hereinbefore contained, is read over to him, and he makes corrections and additions, as follows :

The deed of the Thompson street property is, I think, in the name of my sister Henrietta.

I think I had some of those books of memoranda on
3057 the trial of the divorce case, in 1851 and '2. That is the last I remember of them.

The paper heretofore shown to Mr. Forrest on his cross-examination is here put in evidence ; the counsel for the defendant admitting that the other mortgages mentioned in the witness's examination contain severally a provision as to the inchoate right of dower of Mrs. Forrest, to the same effect as that contained in this exhibit, marked Ex. No. 16.

(Signed)

EDWIN FORREST.

JULY 30TH, 1859.

3058 EDWARD PHALON, *sworn for defendant* :

I am a married man, residing with my family in the city of New York, and keeping house.

Q. How long have you so kept house?

A. I have boarded and kept house for the last twenty-three years; have kept house for seven years where I am.

Q. Are you acquainted with the cost of keeping house in the city of New York, including rent, provisions, clothing, fuel, lights, servants' wages, and the general expenses of housekeeping?

A. I am, so far as my own family is concerned.

Q. Of how many persons does your household consist?

3059

Objected to, as irrelevant.

A. Of five—myself, wife, son and two servants.

Q. What is the weekly cost of maintaining your household, including clothing for your wife, servants' wages and the other expenses of housekeeping?

Same objection.

A. I think I can cover the whole expense with thirty-five dollars a week; my son clothes himself; that is independent of rent.

Q. Where do you reside?

Objected to.

A. Ninety-nine Grand street.

Q. What kind of building?

3060

Objected to.

A. Two-story, brick, attic and basement.

Q. What is a fair rent for that house?

A. I don't know; I own the property; I have been offered a thousand dollars for it.

Q. For what annual rent can a commodious three-story building, suitable for a respectable family, be obtained in the upper part of the city of New York—say above Twenty-third street?

A. Well, it makes some difference in the location of the property; I know some property that is just rented in Thirty-eighth street, between Third and Fourth 3061 avenues, three-story, brown stone front, for \$700.

Answer objected to, as irrelevant.

Q. What is the average rent for buildings of that class in Thirty-eighth street and its vicinity?

A. That is the only property that I know.

Q. What is the amount of wages for cook and chamber-maid in the city of New York?

A. My folks pay eight dollars a month to each.

Q. About what per year would it cost, in the city of New York, to furnish the fuel for a family occupying such a house as yours?

3062 A. I have burnt between fifteen and eighteen tons a year; I pay \$4 $\frac{7}{10}$ by contract per ton.

Q. From what you know of housekeeping in the city of New York, the prices of provisions, fuel, clothing, servants' wages, and other expenses of housekeeping, what would it cost, per year, a respectable lady of middle age to maintain a household in a comfortable dwelling, with two servants?

A. I don't think I am capable of speaking for any body else, except myself.

EDWARD PHALON.

JOHN H. GIBON, *sworn for defendant* :

Q. Where do you reside, and what is your present occupation?

A. Paterson, New Jersey; I am the editor of the 3063 Democrat.

Q. Were you at any time, and when, in San Francisco, California?

A. I was there in the years 1849, 1850, 1851, 1852, 1853 and 1854, having in that period made three visits to my former residence, Philadelphia.

Q. Did you, in California, become acquainted with Mrs. Catharine N. Forrest, the plaintiff? if so, when?

A. Yes, sir; in the winter and spring of 1853-4.

Q. What was then her occupation there?

Objected to, as irrelevant; plaintiff desiring discussion, reserved until more full disclosure of what it is about.

A. She was managing a theatre; also acting. 3064

Q. Did you make any contract with her, as such manager, in relation to any actress, and if so, when and what was the contract?

Same objection; same disposition of it.

A. Yes, sir; I called on Mrs. Sinclair (to Referee), by her I mean Mrs. Forrest, in regard to an engagement for Miss Heron at the Metropolitan Theatre; Mrs. Forrest, or Mrs. Sinclair, informed me that the expenses of the house were \$700 a night; the house was capable of holding, at the prices, between three and four thousand dollars; the engagement for Miss Heron was made, she to receive half the proceeds after deducting \$400, with 3065 a benefit, as is usual, she receiving half the gross receipts of the house, one night in the week; Miss Heron fulfilled the engagement.

Q. How many nights in the whole were the performances in that theatre?

A. Every night in the week; Miss Heron did not play on Sunday, I think.

Q. Was there a performance on Sunday night?

A. There was, sir, by the company.

Q. How long did that engagement of Miss Heron last?

A. That engagement, I think, was one week; she 3066 played a subsequent one, that I had nothing to do with.

Q. What kind of houses did Miss Heron draw during that first week?

A. The houses were large.

Q. Did Madame Anna Thillon play an engagement at the same theatre? if so, when and how long did such engagement last?

A. Madame Thillon played an engagement immediately before Miss Heron, three nights in the week, alternate nights; Mr. Murdock playing between.

Q. Can you state what kind of houses Madame Thillon drew? 3067

A. The houses were very crowded, so much so, that it was difficult to obtain admission unless you went early ; seats could not be procured.

Q. Do you know any thing about the terms of Madame Thillon's engagement ?

A. Nothing positively.

Q. What was the name of the theatre which Mrs. Forrest managed, as you have stated ?

A. The Metropolitan.

Q. What was the name of the person who kept the
3068 box-office of that theatre ?

A. I think during the time I speak of, the engagement of Miss Heron, Mr. Smith, I do not know his first name, kept the box-office ; afterwards, I think, Mr. J. B. Booth kept it ; I am not certain ; I met him there.

Q. How long, and up to what date, did Mrs. Forrest continue to manage the Metropolitan Theatre ?

A. I could not answer ; I left California while she was still in charge of the theatre.

Q. During all the time you know of her managing it, was it, so far as you know, successful or otherwise ?

Objected to. Question waived.

3069 Q. While Mrs. Forrest managed that theatre, what was the effect of the management, as to gain or loss, so far as you know ?

Objected to, and for special cause, that it does not appear that witness knows, and seems to call for opinion. Plaintiff waives ruling at present.

A. The theatre was well attended generally ; the engagement of Miss Heron, which was not more than an average one, paid her, Miss Heron, liberally ; the houses were generally well filled.

Q. While Mrs. Forrest managed that Theatre, where did she reside ?

3070 A. In Montgomery street, nearly opposite the theatre.

Q. Did she occupy the whole of the house in which she resided ?

A. No, sir, she did not; the lower part of the building was used for stores; Mrs. Forrest occupied the upper portion of the house—how much of it I don't know.

Q. Who resided with her?

A. That I cannot tell; Mr. Murdock, I think, occupied a part of the same building; he did; whether as part of the same family or not. I don't know.

Q. Do you know that Mr. Murdock resided in that house?

Plaintiff's counsel inquires what is the relevancy of 3071 that question.

Defendant's counsel says he desires to show that Mrs. Forrest was content to reside in part of a house.

A. I have visited Mr. Murdock there, sir, at his room, in the same building.

Q. Had you any opportunities to ascertain in what style Mrs. Forrest lived?

A. I was in Mrs. Forrest's rooms on two occasions; she lived quite comfortable for that country.

Q. Did you ascertain what were her habits as to extravagance or economy?

Plaintiff's counsel objects to this question, as wholly 3072 irrelevant, so far as the object is to show that expenditures were wasteful, or beyond necessity, but if the object is to show economy, or any thing tending to prove an acquisition or accumulation of property, it is not objected to.

Counsel for defendant states that he proposed by this question to elicit proof tending to show that Mrs. Forrest is habitually extravagant in expending money for her personal luxuries.

Objection sustained. Defendant excepts.

Q. Are you acquainted with Mrs. Forrest's general character as to chastity, during the period you resided in 3073 California?

Objected to, as irrelevant.

Objection sustained. Defendant excepts.

Q. What class of persons visited and were the intimate associates of Mrs. Forrest in California, while you resided there ?

Objected to, as irrelevant.

Counsel for defence states, the two last preceding 3074 questions are put with a view to elicit proof showing that Mrs. Forrest, while residing in California, was habitually unchaste, and constantly received as her most intimate companions, visitors, and friends, the profligate men of San Francisco, whose names and occupations we propose in this connection to show.

Objection sustained. Defendant excepts.

Q. Who was the stage manager of the theatre you have mentioned ?

A. I can not remember ; I knew at the time.

Q. Who was the carpenter ?

3075 A. A man named Torrance.

Q. Who was the treasurer ?

A. A portion of the time, Mr. Smith, the same who was in the box-office ; I understood him to be the treasurer.

Cross-examined :

Q. Were you in San Francisco when the Metropolitan Theatre first opened ?

A. I was there when the theatre opened ; I was at the theatre.

Q. What name did the manager, at such, its first opening, go by in the bills and advertisements ?

A. Mrs. Catharine Sinclair ; some of the bills, late Mrs. Forrest ; I have seen that on some of the bills.

3076 Q. Will you swear that you ever saw on a bill, at the Metropolitan Theatre, any such words as late Mrs. Forrest ?

A. I have seen them on bills in California of her performances there, but will not positively say that I ever saw them at the Metropolitan Theatre.

Q. Will you swear that you ever saw in San Francisco

a play bill posted up referring to Mrs. Sinclair as late Mrs. Forrest?

A. I could not now swear positively that I ever saw a bill posted there at all; I refer to the common house bills that I saw "late Mrs. Forrest" on.

Q. Were you at the theatre on the night of its first opening? 3077

A. Yes, sir.

Q. State, as near as you can, the time of that occurrence?

A. It must have been, sir, about Christmas, of 1853.

Q. How long after that time did you continue to live uninterruptedly in San Francisco?

A. Until the month of March, 1854.

Q. Where did you then go, and when did you return to San Francisco?

A. I removed from there to Philadelphia, and never returned, sir.

Q. On what day in March did you leave San Francisco?

A. That I can't now remember; it must have been on 3078 the 10th or 20th; those were the regular steamer days, and I sailed in the regular steamer.

Q. Were you a regular attendant at the theatre, from the time of its opening, until you left?

A. I was frequently there; seldom missed a night at one or the other theatre; my business took me there; I was connected with a newspaper, and made reports.

Q. Did you attend all Miss Heron's performances, during the engagement that you spoke of?

A. I do not remember being absent any one night; that is, the first engagement; I left San Francisco while she was playing the second engagement; I left her on the stage during rehearsal, and went directly from there on to the steamer. 3079

Q. Did you attend the Metropolitan theatre, during all Madame Thillon's performances, while you were then in San Francisco?

A. The first night I procured tickets to attend, but could not get in ; I think I was present at all the other performances at that engagement ; I don't know whether she played another engagement afterwards or not.

Q. How many performances were there by Madame Thillon, during that engagement ?

3080 A. I can't remember, sir.

Q. State as nearly as you can the number ?

A. I think, six ; she played alternately, every other night.

Q. Did you, during that time, attend the nights of Mr. Murdock's performance ?

A. I did not ; I visited the American Theatre, where Miss Heron was playing those nights.

Q. Did not Miss Heron and Madame Thillon belong to the attractive class of performers called stars.

A. Yes, sir, they did.

Q. Did you, of your own knowledge, know what sum or sums Miss Heron received for her performance ?

A. I never saw her receive any of the money, and don't know.

3081 Q. On the evening when you did happen to attend the Metropolitan, and neither Miss Heron nor Madame Thillon was performing, was the attendance the same ?

A. I have seen smaller houses, and I have seen as full, at different times—not the same.

Q. Was the Metropolitan Theatre a new building, open for the first time under this arrangement of which you have spoken ?

A. Yes, sir.

Q. Do you know to whom the building belonged ?

A. I did then, but I never taxed my memory with it ; I forget.

3082 Q. Did you know what the rent of that building was per year ?

A. I did not.

Q. In this conversation, when Miss Heron's engagement was made, was the rent of the theatre stated?

A. I simply remember, that Mrs. Forrest assured me the nightly expenses were over \$700; I have no knowledge of the rent being named; I did not come on here to be a witness in the cause; I came here accidentally.

JOHN H. GIBON.

WILLIAM HENRY WELLER, *called for defendant and sworn:*

Q. What is your residence and occupation?

A. 713 Broadway; confectioner.

Q. Do you know Mrs. Catharine N. Forrest, the plaintiff?

A. Yes, sir; slightly.

Q. Did she at any time occupy any and what apartments in 713 Broadway?

A. She did, two several times; I cannot state the times; one was before she went West, the last time, the other was since she returned; the first occasion was last winter, and was about six weeks; the second time was from about early in June to the present time; the apartments she had at first consisted of three rooms adjoining on the third floor, front; the second time she occupied two rooms on the same floor, back, being those she now occupies.

3084

Q. Who is residing with her?

A. She has a sister, Miss Sinclair, and there is a gentleman of the name of Sedley, who has a separate room.

Q. About how old is her sister?

A. She may be 25, may be more; am not much of a judge of ladies' ages.

Q. How are her meals provided?

A. Served in her room—her parlor; by a waiter in our employ.

Q. What is the charge made to her by you for her apartments, meals, attendance and whatever else you provide for her and her sister?

Objected to by plaintiff. Ruling waived. 3085

A. I suppose that for the three rooms last winter, including fire and gas, the charge was \$15 per week; that for the three rooms now occupied by the parties, the charge is \$17; for the meals sent to the rooms we charge 50 cents a day, and our card charges for the articles furnished; the price of the meal of course varies according to the supplies; I think that must be about correct.

W. HENRY WELLER.

3086 Adjourned to Monday, August 1st, at 10 o'clock.

AUGUST 1ST, 1859.

WILLIAM G. ACKERMAN, *sworn for defendant*:

Q. Where do you reside and what is your present occupation?

A. At Yonkers; I am a farmer.

Q. How long have you resided in Westchester county?

A. All my life.

Q. Are you an assessor in that county?

A. Yes, sir.

Q. How long have you been an assessor?

A. This is the second year on this term, and I was
3087 an assessor for three years, five years ago.

Q. Have you owned and sold real estate near Yonkers, in Westchester county?

A. Yes, sir.

Q. Do you know the property of Edwin Forrest, the defendant, called Fonthill, and the other land adjoining it owned by him, consisting of about 24 acres?

A. Yes, sir.

Q. Are you acquainted with the value of that land?

A. As far as my judgment is concerned, yes.

Q. What is its value?

A. I should think it was worth about six hundred
3088 dollars an acre; there is a good deal of land bought and sold in the town of Yonkers with a very small percent-

age paid down, and that alters very materially the price that land brings.

Q. Is there any building on the twenty-four acres?

A. No, sir.

Q. How far from Fonthill is the nearest fancy residence?

A. Lispenard Stewart's house is about 500 yards from the Castle itself.

Q. How long is it since that was built? 3089

A. I should think along about 1847.

Q. Since 1852, within how short a distance of the Fonthill land has any gentleman's residence or private mansion been erected?

A. Not far from half a mile.

Q. For what town are you assessor?

A. Yonkers.

Q. What is the locality of your residence?

A. I live near Kingsbridge, the south end of Yonkers.

Q. How long have you resided there?

A. Nearly five years.

Q. Where was your residence before?

A. At a place now called Riverdale.

Q. How far from Fonthill was that prior residence?

A. About one mile. 309

Q. How much property did you own at Riverdale?

A. One hundred and thirty-two acres.

Q. Have you sold it all?

A. No, sir.

Q. What amount of it in dollars is sold?

A. Fifty-one thousand.

Q. At what rate is the property at Fonthill and the twenty-four acres adjoining assessed by the assessors of the town of Yonkers?

A. The Fonthill property that Mr. Forrest sold is assessed at \$90,000 this year; that is a good deal higher than it ever was assessed before; they have got now an immense building on it; the other piece is 3091 assessed at \$300 per acre.

The counsel for the plaintiff states that he considers the whole evidence, relating to the dealings of this witness in land and the assessors' valuation, as irrelevant.

Decision waved.

WM. G. ACKERMAN.

EDWIN FORREST, *recalled for re-direct examination* :

Q. Since you were cross-examined in this proceeding, have you been to Philadelphia, and there examined and procured papers relating to your estate and that of your mother and sisters?

3092. A. I have.

Q. Can you now state, more particularly than you have heretofore done, what bank accounts you have had?

A. Yes, sir.

Q. State?

A. I have deposited money with my friend, William Swan, merchant in North Third street; he took the benefit of the National Bankrupt Act, by whom I lost some thousands of dollars; also Samuel P. Witherill, during several years; these, with the Bank of Penn Township, the Gerard Bank, the Bank of Commerce, of Philadelphia, where I have now an account, and the Mechanics' Bank, of Philadelphia, where I formerly had
3093 an account; and in New York, formerly with the Bank of America; also with the Mechanics' Bank, where I now have an account.

Q. State the amounts now to your credit in the Bank of Commerce, Philadelphia, and the Mechanics' Bank of this city?

A. At the Mechanics' Bank, \$2,407 $\frac{3}{10}$ %, and in the Bank of Commerce, Philadelphia, \$143 $\frac{8}{10}$ %.

Q. You spoke of a village lot in Yonkers; produce the deed.

A. This is the deed from Joanna V. Kellinger, to my sister Henrietta Forrest, dated April 22d, 1856, recorded
3094 May 5th, same year, the consideration expressed being

\$400 ; in my former examination, I said this land belonged to me ; I find it does not.

Q. Look at the deed now shown you, and say when, by whom, and for what consideration, and to whom the property No. 39 Thompson street, in the city of New York, mentioned in your former examination, was conveyed?

A. By deed, dated May 1st, 1856 ; executed by James Barron, for the consideration expressed, \$4,500, to Henrietta Forrest, my sister.

Q. Was the property, No. 37 Thompson street, in the city of New York, at any time conveyed to your sister 3095 Henrietta ; if so, when, for what consideration and by whom ?

A. It was ; by deed of May 1st, 1856, the consideration expressed is \$4,000, by John Boyd and Helen, his wife ; the deed is recorded in Liber 714, p. 69.

Q. You spoke in your former examination of some six or eight acres of land at Yonkers, in addition to the town lot, 24 other acres, and Fonthill ; when, for what consideration, by whom, and to whom was the property conveyed ?

A. I was in an error in regard to that ; there were eight acres and a fraction ; nearly nine acres, I think ; namely, eight acres and $\frac{326}{1000}$ of an acre ; it was executed December 22d, 1852, for the expressed consideration of \$6,000, by James Valentine and wife, to my sisters 3096 Henrietta, Caroline and Eleanora ; I was under the impression that I paid \$600 an acre for that.

Q. State when, for what consideration, by whom, and to whom, the property at the corner of Broad and Master streets, in Philadelphia, was conveyed ?

A. I have the deed here, dated July 12th, 1855, for the expressed consideration of \$33,000, from William Gall and wife to the same three sisters ; the property was subject to a fee farm rent to the Farmers' and Mechanics' Land and Building Association ; by release, 3097

dated May 11th, 1859, that association, for the expressed consideration of \$10,088.45, released to my said sisters such rent forever; the lot, which I spoke of as in the fields at Philadelphia, I find was conveyed on the 23d of October, 1854, by Fayette Pierson and wife to my sisters aforesaid, for the expressed consideration of \$400; that is another parcel which I thought was deeded to me.

I produce a plat or map of the Covington property, marked Exhibit A; my property is that marked with
 3098 my name, one parcel being so designated in the imprint and one thus: "The Burke lot," E. Forrest.

I produce certain conveyances of land to me in Michigan, which I did not remember when I last testified.

A description of them, agreed on by counsel, is marked Exhibit B.

Q. Can you state how much of that Michigan land is now yours, or its situation or value?

A. I cannot state the amount of acres of it which is mine; one or two parcels have been sold at about \$300, I suppose; the original price was about \$4,000 for all the lands, and I don't think they have ever
 3099 reached as high since; it is several years since I have heard any thing about them, from a gentleman who acted as my last agent, whose name is L. B. Muzner, of Detroit; I don't know that the taxes have been paid, and the lands may probably have been sold.

I find that I am the owner of two-sixteenths of a ship called the Edwin Forrest; I did not remember that when I last testified; the original value of my share was \$7,937, and it is now worth about \$3,500; that I also gave to my sister or sisters; I don't know which; I bought it November 10th, 1853.

I find, also, that I am the owner of a bond for the sum of \$10,000, executed to me October 22d, 1853, by
 3100 Wm. H. Maurice of Philadelphia, payable in five years

from its date, with interest at six per cent. per annum, half yearly, to be computed from January 1st, 1854 ; no part of the principal money has been paid, but the interest has been regularly paid to January 1st, 1857 ; Mr. Maurice gave me some security for that money in addition to the bond ; I do not remember what it was, but have sent to Philadelphia to ascertain, and expect to be able to state to-morrow ; I did not remember this bond when I testified before ; there is also another bond from the said Maurice to me, dated January 1, 1857, for the sum of \$5,000, payable in installments of \$500 semi-annually, with lawful interest, payable also semi- 3101 annually ; no part of the principal or interest has been paid on said bond ; the \$15,000 of stock mentioned in my cross-examination was issued to me in my name the 11th of April, 1838, being stock of the five per cent. Philadelphia loan made under an ordinance of Councils, June 22, 1837, and I have here the certificate of stock, number twenty-one ; my mother, as my attorney, and for herself, collected the interest on that stock, and had it to her own use until it was sold ; I find that I am also the owner of two shares of the stock of a new hotel now being erected in the city of Philadelphia, formerly known as the Butler House ; for these I paid 3102 \$1,000 in all, at different times, in 1857, 1858 and 1859, and I have received no interest or principal on this stock.

I also own one share of the stock of the Arch Street Theatre, Philadelphia, issued to me December 13, 1838 ; this is considered a share at \$500 ; the present price in the stock market is \$300.

Q. Look at the paper now shown you, marked Exhibit C, and say if it is the deed of gift of personal property to your sisters, mentioned in your cross-examination, and when it was executed ?

3103

A. It is, and was executed the second day of October, 1850.

Q. Where do the subscribing witnesses to that paper reside?

A. In Philadelphia.

Paper marked Exhibit C offered in evidence and received, a copy of which is annexed.

Q. Since you were last examined in this reference, have you examined the library which you formerly owned and about which you were interrogated on your
3104 cross-examination?

A. I have.

Q. Can you state now about what number of volumes it contains?

A. About 4,600 volumes, and the value is \$4,592; this estimate of value was made by Thomas F. Bell, book auctioneer for the last twenty years in the city of Philadelphia.

Q. Does that library now contain a greater or less number of books than when you resided in 22d street with Mrs. Forrest?

A. A greater number, I presume; I, however, will
3105 say that, having had many duplicates of books, I have given a great number away; I don't remember distinctly to whom, but quite a large amount I gave at one time to the Fairmount Hose Company, Philadelphia.

Q. When you were residing with Mrs. Forrest, the plaintiff, at 284 West 22d street, in the city of New York, during the years 1848 and 1849, did she keep an account book in which she entered the moneys received by her from you to pay the expenses of the household and the particulars of her disbursements of such moneys?

A. She did.

3106 Q. Look at the memorandum book now shown you, marked by the Referee D, and say in whose handwriting each and every entry therein is?

A. Each and every of them is in Mrs. Sinclair's handwriting.

Q. Of what moneys is that an account, and for what purposes were they received and expended ?

A. The household expenses for herself and her sister Virginia, for myself, for a servant by the name of Robert, and a cook and a sewing woman besides ; I think her sister, Mrs. Voorhies, was not permitted to come into 3107 the house during the period covered by this book.

Book marked D offered in evidence, and received.

Q. When and where did you find the book D, so as to have it produced here ?

A. I found it in Philadelphia yesterday, while searching for these papers.

Q. Did you know of, or remember that it existed at any time between the trial of this action and yesterday ?

A. I have no remembrance of it.

Q. Have you of late years been careful or otherwise in regard to the arrangement and custody of your papers or accounts ?

A. I have been very neglectful of all, indeed reckless, since 1849, '50.

Q. Have you since then kept any account of your receipts or expenditures ?

A. Not since 1850.

Q. Can you state any reason why you cannot give an account of what you have received for your services as an actor since 1852, and how you have disposed of such receipts ?

Objected to by plaintiff. Evidence allowed.

A. I can ; the injustice and the wrong done to me on that trial by a one-sided judge and a perjured jury have made me entirely reckless for myself with regard to all 3109 the moneys and property of this life, excepting only for the care of my sisters.

Q. What allowance did you make to the plaintiff

while you and she resided together, for her clothing, or to procure it?

A. Two hundred dollars a year.

Q. Did she request any more?

A. I don't remember that she did.

3110 Adjourned to Aug. 2, '59, at 10 A. M.

Aug. 2, 1859.

HENRY WHEELER, *for defendant* :

I am hotel keeper at the Lafarge Hotel in this city; I am the proprietor.

Q. Did Mrs. Catharine N. Forrest at any time, and if so, when, occupy any apartments in that hotel?

A. She occupied apartments there from the 30th of November last until the 21st December, parlor and bedroom on the third floor, front.

Q. Who resided with her?

A. Her sister, Miss Sinclair; a gentleman named Sedley came with them and remained as long as they did.

Q. Were her meals furnished in her room.

3111 A. Yes, sir.

Q. At what rate was she charged for apartments, meals, fuel, lights, and attendance?

A. Fifty dollars a week for the two.

Q. Of what class is that hotel?

A. It is a first-class hotel, and it ranks as such.

Q. Did Mr. Sedley take his meals with Mrs. Forrest and her sister?

A. Yes, sir.

Q. Were his meals included in that price?

A. I think they were not.

Cross-examined :

Q. Did this charge include washing or any thing
3112 beyond what you have specified?

A. No, sir.

HENRY WHEELER.

EDWIN FORREST, *recalled for re-direct examination:*

Q. Can you now state whether you have any security for the payment of either of the bonds from Maurice to you, mentioned in your testimony yesterday?

A. I telegraphed to him yesterday to know what securities he had given me, and have ascertained there is no security except the bonds themselves.

Q. Can you state the value of Maurice's property or estate?

A. I cannot.

Q. Is the claim you have against him good for the \$113 whole amount?

A. I believe it is not.

Q. What price or consideration did you receive for the property 284 West Twenty-second street, New York, when you sold it?

A. Eleven thousand five hundred dollars; that was my dwelling-house and lot; just before I sold it, I expended nearly \$2,000 in repairs and painting on it.

EDWIN FORREST, *recalled for further cross-examination:*

Q. Has any one of your sisters signed a will?

A. Not that I know of; if they had, I should have heard of it, I think.

Q. Has any one of your sisters signed any paper in relation to any of the property that you have alluded to, as having been conveyed to them?

A. They have only signed one instrument, and that was in the conveyance of the house and lot 144 North Tenth street, Philadelphia; I never asked them to sign any other, nor have they, I believe, executed any paper in regard to the property, but that.

Q. What is the width of the house purchased from Mr. Gaul?

A. Fifty feet.

Q. How many stories high is it, and of what material constructed?

A. Three stories high and attics, brown stone front, and built of brick.

Q. Is that house furnished with the same furniture that was in the North Tenth street house, or how otherwise?

A. All the furniture that was at the North Tenth street house was taken to that house, and is there now.

Q. Was any furniture added for such new house?

A. Yes.

3116 Q. About what sum did the new furniture supplied to the new house cost?

A. I can't tell.

Q. Who paid for it?

A. I did.

Q. Is that new house well and handsomely furnished?

A. It is respectably furnished, in my view of things; there are very few houses handsomely furnished, in my view.

Q. Did you or your sisters move into that house before the conveyance was obtained?

A. I don't know; we moved into the house before the house was comfortably furnished, as I myself had to
3117 sleep upon a mattress on the floor; and the house was not furnished for several years.

Q. Did you execute to Mr. Gaul a mortgage upon the North Tenth street house?

A. I don't remember; the price of the North Tenth street house was about \$6,000, I think, and went in, I believe, as a part of the price to pay Mr. Gaul.

Q. Was there a suit, or a legal proceeding in Pennsylvania, in favor of Mr. Gaul, and against you, relative to that North Tenth street house?

A. I don't remember.

Q. Was that North Tenth street house sold by public
3118 authority, or on some judicial proceeding?

A. I believe it was, to make the title good to Mr. Gaul; he and the conveyancer, I think, managed some

matters of which I know little or nothing ; I believe there was a proceeding, and this is all I know in relation to it, and a sale by the Sheriff.

Q. Was that proceeding founded upon, or connected with some mortgage or other instrument executed by you ?

A. I don't remember.

3119

Q. Were you present at the Sheriff's sale ?

A. I was not ; I don't think I was in the city ; it was a matter managed by the other parties for their own security.

Q. What difficulty or impediment was suggested in the title rendering this legal procedure advisable ?

A. I don't remember.

Q. Was the lawyer or commissioner who acted in the preparation of the papers relative to conveying the North Tenth street property to Mr. Gaul, and the Broad street property to your sisters, employed by you, or by whom ?

A. There was no lawyer in the case ; there was a conveyancer, Mr. Wetherby, and he was paid by Mr. Gaul ; that is for the Tenth street house, and, I believe, for the other too.

Q. Had he not previously to that done business for you ?

A. I don't remember, but I think not.

Q. At about what time did you give the interest in the vessel called Edwin Forrest to your sisters ?

A. I don't know.

Q. Did you execute any paper to that effect ?

A. Yes.

Q. Where is it ?

A. It is in the hands of Mr. James Lawson, of 62 Wall street.

3121

Q. Is he your agent ?

A. No, sir, he is my friend.

Q. You have alluded to two pieces of property in

Thompson street, New York. Do they, together, constitute the Thompson street property which you alluded to in your first cross-examination.

A. Yes.

Q. In the course of your examination, allusion has
3122 been made to what is called, in general terms, the Chelsea property, and sometimes to the property in or on Twenty-first and Twenty-second streets. Do those two phrases mean the same thing and refer to the same property?

A. Yes.

Q. Have you ever given away, conveyed, assigned, or pledged the \$75,000 mortgage on Fonthill, given to you by the Sisters of Charity, or any part thereof, or any interest therein?

A. No.

Q. Were the two bonds, given to you by Mr. Maurice and to which you have referred, recorded?

A. I believe they were; I think Mr. Wetherby did it; I might be mistaken in saying that he never did any
3123 business for me; I am almost sure he did that; I think it was about the time of the second loan.

Q. You stated that you expended a very large sum on Fonthill. How much of that was spent on the erection of your dwelling-house?

A. I don't remember; I made a calculation about the time I sold the property, including that house or mansion, a large stone barn, a stone cottage, improvements on the water front, wherein I think I took at least an acre and a half of the river, filling it up; the erection of out-houses, the making of ponds, building stone fences, horses and mules, and the labor, with other matters, which I cannot recollect; it came to about \$90,000, inclusive of the land, which was about ten
3124 thousand dollars or more.

Q. About what proportion of that was expended before 1849?

A. I don't recollect ; I have no recollection, ~~or~~ a very imperfect recollection of dates.

Q. Since you recently found the book marked D, have you read, examined, or looked into its contents ?

A. Most of it I did here in presence of this Court yesterday.

Q. Did these sums, entered as received from you in this book, include or purport to include the \$200 a year, \$125 which you say were allowed to your wife for her clothing ?

A. I have no knowledge of that book further than I have said, but it seems to me that the \$200 allowed for clothing could not be contained therein.

Q. Did you not allow a sum per annum as for pocket money or personal use, irrespective of clothing or house expenses ?

A. Not that I remember ; I used to give her, beyond her allowance of \$200 a year for clothing, occasional presents of garments or wearing apparel, but that was the fixed sum set by herself.

Q. This book D exhibits an expenditure of about \$126 \$100 a month ; do you suppose that that amount covered substantially the expense of maintaining your house and family irrespective of rent, furniture, and clothing ?

A. I take it that it purports to be exactly what it exhibits and what it intended to exhibit—the household expenses.

Question repeated.

A. I do.

Q. What did your family use for fuel ?

A. Coal, I believe ; anthracite I think was the largest quantity, and some bituminous coal.

Q. Did your family take milk ?

A. Yes.

3127

Q. Did your family use vegetables from the market ?

A. Yes ; I don't know where they came from.

Q. Did your family take butcher's meat and poultry ?

A. Yes.

Q. Do you know whether that book contains any expenditure for hard coal, for wood, for milk, for vegetables, or for butcher's meat?

A. I do not; I would not swear to any item in the book except at the last part, those about servants, and 3128 I scarcely know about that.

Q. Had you not running accounts with Mr. Brant, a butcher, for meat and poultry, which you generally paid yourself?

A. There was an account with Mr. Brant, since you mention it; I don't know that I ever paid him a bill in my life; the household expenses were all paid by herself, and when she told me the amount, I always paid to her the money, or to the person to whom she told me to pay, for wine, brandy, &c., but wine and brandy were not included in the household expenses, at least not generally; I paid for those matters myself.

Q. Had you not a running account for groceries with Mr. Duncan, the large wholesale grocer, for supplies to your family?

3129 A. I had.

Q. Who paid the bills to him?

A. I don't remember.

Q. Was gas used in your house at the time and candles also burnt to some extent?

A. Gas was used in 1848; as to the candles, I presume bedroom candles or oil lamps were used.

Q. Look on exhibit marked C, and say in what place was it executed, naming the house and town?

A. It was executed in Philadelphia; I don't remember the house nor street; it might have been the corner of Walnut and Eighth streets, at the store of Mr. Donnelly, whose signature is here as witness, or at the store 3130 of Mr. Maurice, on Chesnut street, or it might have been at the theatre or elsewhere.

Q. Can you not remember in what place it was?

A. No, sir, I could not ; as I have said before, I have no memory for these things.

Q. Were all three of the witnesses, whose names are subscribed to it, present at the same time, and did they all sign it at the same interview ?

A. It is my impression they did.

It is admitted by the defendant that on the back of each of the two bonds, executed to him by Maurice and 3131 mentioned in his examination, there is an endorsement signed by the prothonotary of the District Court of the city and county of Philadelphia, stating that such bond had been entered in the office of such court—that for \$10,000 on the 24th of June, 1856, and the other on the 28th of April, 1857.

Q. Have you recently seen the power of attorney which you gave your mother, authorizing her to collect the interest on the stock ?

A. No.

Q. Do you know whether that paper is yet in existence ?

A. No.

3132

The plaintiff now puts in evidence an exemplification of the mortgage for \$75,000, executed by the Sisters of Charity to the defendant, Ex. No. 19.

EDWIN FORREST.

Plaintiff puts in evidence a copy of a record of certain proceedings in the District Court for the city and county of Philadelphia, in an action of *scire facias*, there prosecuted between William Gaul and Edwin Forrest, marked Ex. 17.

Also, gives in evidence a copy of the mortgage in such proceedings referred to, and of the certificate of satisfaction thereon, which are together marked Ex. No. 18.

3133

It is stated on the part of the plaintiff, and admitted by the defendant, that where "Rebecca" is stated in these papers as the name of the defendant's wife, it is a

slip of some scrivener, and ought to read Catharine N., his wife, the plaintiff being the person meant.

Adjourned to Aug. 3d, 1859, at 10 A. M.

AUG. 3D, '59.

PARTIES PRESENT.

The defendant produces the bill of sale of his interest
3134 in the ship "Edwin Forrest," executed by him to Eleanor Forrest, dated June 26th, 1855, in the usual printed form and for the expressed consideration of \$8,000.

JAMES LAWSON, *sworn for defendant* :

I reside at 144 West Twelfth street, and am an adjuster of averages.

Q. Do you know the ship Edwin Forrest, in which the defendant formerly owned an interest, which he has transferred to his sister Eleanor ?

A. I do.

Q. Are you acquainted with the value of ships and vessels generally ?

3135 A. I am, generally.

Q. What is the value of the ship Edwin Forrest ?

A. I don't think she will bring \$30,000 to-day, ships are very much depressed.

Cross-examined :

Q. Did you bring the bill of sale here, and is it filled up in your handwriting ?

A. I brought the bill of sale here, and it is partly in my handwriting.

Q. Were you present when it was executed ?

A. I was.

Q. Has it been in your possession ever since ?

3136 A. Yes, till I delivered it to Mr. Brady, defendant's counsel, this morning.

Q. Is not all the filling up of the blank of such bill of sale to Miss Forrest in your handwriting, except the

filling up of the blanks in the copy of the register, which is in the body of such bill of sale ?

A. No, because I did not put the signatures there, and they are a part of it.

Question repeated.

A. If it refers to the filling of the blank, of course it is.

3137

Q. Has this bill of sale ever been recorded or entered at the Custom House ?

A. No, sir, because it is not necessary to do so to secure the title ; had it been necessary, I should have recorded it.

JAMES LAWSON.

At the request of the Referee, in explanation of book D, the plaintiff, through her counsel, states that "Smith" kept a store in Eighth avenue, near the family residence. He sold clams, oysters, and country marketing ; things wanted in a hurry were got from him.

Smith & Torry were plumbers, or painters, who did some little things about the house in the way of re- 3138 pairs.

E, when it occurs, means the defendant.

Defendant's counsel assents to it.

The plaintiff's counsel, at the request of defendant's counsel, makes the following admission, which is accepted :

An allowance was paid to Mrs. Forrest at the rate of \$1,500 a year, quarterly, in advance, from about the first of June, 1849, until the first day of November, 1851 ; execution of the judgment was stayed by security on the appeal by defendant.

JOHN ROSS, *sworn for defendant* :

I reside in New York ; my occupation is that of a real 3139 estate broker.

Q. Are you acquainted with the rates of rent for dwelling-houses in the upper part of the city of New York, say between Twentieth and Fortieth streets ?

A. Yes.

Q. What is the average rent for a dwelling in the region mentioned, suitable for occupation by a respectable family?

3140 A. The average would be about from eight to fourteen hundred dollars, I should say; for the former price, a very good three-story, twenty-foot front house could be obtained.

JOHN ROSS.

Defendant rests.—Plaintiff also rests.

Filed December 10th, 1859.

(A Copy.) GEO. T. MAXWELL, Clerk.

Exhibit No. 1.

Samuel E. Johnson, Master in Chancery, to Edwin Forrest:

This Indenture, made the fifth day of May, in the year one thousand eight hundred and forty-seven, between Samuel E. Johnson, one of the Masters in Chancery, in
3141 and for the State of New York, dwelling in the county of Kings, of the first part, and Edwin Forrest, of the city, county and State of New York, aforesaid, Tragedian, of the second part.

Whereas, at a Court of Chancery, held at the city of New York, before the Chancellor of the State of New York, on the thirty-first day of May, one thousand eight hundred and forty-one, it was, among other things, ordered, adjudged and decreed by the said Court, in a certain cause then pending in the said Court, between Samuel De Veaux, Complainant, and David Bignall, and others, Defendants—That all and singular, the mortgaged
3142 premises, mentioned in the Bill of Complaint, in said cause, and in said decree described, or so much thereof as might be sufficient to raise the amount due to the complainant, for principal, interest and costs, in said cause, and which might be sold separately, without material injury to the parties interested, be sold at public

auction, according to the course and practice of said Court, by or under the direction of one of the Masters thereof, that the said sale be made in the county where the said mortgaged premises, or the greater part thereof, are situated, that the Master give public notice of the time and place of such sale, according to the course and practice of said Court, and that any of the parties in said cause might become a purchaser or purchasers on such sale, that the said Master execute to the purchaser or purchasers of the said mortgaged premises, or such part or parts thereof as should be so sold, a good and sufficient deed or deeds of conveyance for the same. 3143

And whereas a certificate of the enrollment of said decree, signed by the Assistant Register of the said county, has been presented to the said party of the first part ; and whereas the said Master in Chancery, in pursuance of the order and decree of the said Court, did on the seventeenth day of June, in the year one thousand eight hundred and forty-six, sell at public auction, at the Court House in the town of White Plains, in the county of Westchester, the premises in the said order mentioned, due notice of the time and place of such sale being first given, agreeably to the said order, at which sale the premises hereinafter described were struck off to Samuel De Veaux, of Niagara Falls, in the county of Niagara, in the State aforesaid, for the sum of seven thousand eight hundred and fifty dollars, that being the highest sum bidden for the same ; and whereas, by an order of the said Court, bearing date the fourteenth day of April, in the year one thousand eight hundred and forty-seven, it was ordered that the Master make and execute to Edwin Forrest, of the city of New York, tragedian, a deed in the usual form, of the said property, purchased by the said Samuel De Veaux, at the said sale, without prejudice to any lien upon the premises, or any rights which any person may have acquired as against the said De Veaux since the sale— 3144 3145

Now, this indenture witnesseth, that the said Master in Chancery, the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order and decree of the said Court, and in conformity to the statute in such case made and provided, and also in consideration of the premises and of the said sum of money so bidden as aforesaid, being first duly paid as aforesaid, by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey unto the said party of the second part, and to his heirs and assigns forever, all and singular the mortgaged premises mentioned in the bill of complaint in this cause, and described as follows, to wit: All that tract or parcel of land situated in the town of Yonkers, in the county of Westchester, and State of New York, bounded as follows : Beginning fourteen links northerly from a white oak tree at a stake, and running from thence north fifty-nine degrees and one quarter, west, thirty-four chains and seventy-two links to a stake by the Hudson river ; thence twenty-eight degrees and one quarter east, as the river runs, two chains and fifty links ; thence north, sixteen degrees and one quarter west by said river, eight chains ; thence north twelve degrees and one half east, as the said river runs, one chain and thirty-five links ; thence north, thirty-nine degrees and one half east by the said river, ten chains and thirteen links, to the lands of Samuel Lawrence ; thence south, seventy-four degrees and one quarter, east, by the said Samuel Lawrence's land, six chains ; thence south, fifty-two degrees and one quarter, east, by said lands, five chains ; thence south, by said lands, sixty degrees east, ten chains ; thence south sixty degrees and a half east, by said lands, five chains ; thence south, sixty-six degrees east, six chains ; thence south, seventy degrees east, by the lands of Bishop

Lawrence, two chains and forty-one links ; thence south, eighteen degrees and one quarter, west, twenty-one chains and ninety-seven links, to the place of³¹⁴⁹ beginning—containing seventy-four acres and three perches ; reserving a gate road or private way through the said premises, from the turnpike, for the joint use of all those who occupy the farm, formerly owned by John Warner, deceased, and which road comes to the Hudson river on the place now occupied by Ellen Warner. Also reserving one equal half of all the clear profits of the stone quarries on the above-described land to the heirs of William Warner, or their heirs or assigns, that is to say : All contracts for the stone in said quarries, either in leasing or in the privilege of taking the stone from the said quarries, or of selling the stone from³¹⁵⁰ the said quarries or otherwise, the said heirs shall in all cases be consulted as to the price or sum of money to be obtained, and the time and manner of payment, and that they must mutually agree upon the terms of all such contracts, so that the clear profits arising from the said quarries be known, and the said parties must in all cases join in executing such leases. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, excepting so much of the said premises as was sold under the above-mentioned decree, on the fifteenth day of October, one thousand eight hundred and forty-one,³¹⁵¹ to Lispenard Stewart, and also excepting such portions thereof as have been since released by the party of the first part to said Lispenard Stewart.

To have and to hold all and singular the premises above mentioned and described, and hereby conveyed or intended so to be, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof forever. In witness whereof, the said Samuel E. Johnson, Master in Chancery as

3152 aforesaid, hath hereunto set his hand and seal the day and year first above written.

SAMUEL E. JOHNSON, [L. s.]
Master in Chancery.

Sealed and delivered in }
 the presence of }

N. VAN BRUNT.

State of New York, County of Kings, ss.:

On this sixth day of May, A. D. 1847, before me came Samuel E. Johnson, to me known to be the same person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

3153

N. VAN BRUNT,
Justice of the Peace.

State of New York, County of Kings, ss.:

I, John M. Hicks, Clerk of the county of Kings and Clerk of the Court of Common Pleas, in and for said county, do hereby certify that Nicholas Van Brunt, whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a Justice of the Peace, in and for said county, dwelling in the said county, elected and sworn and duly authorized to take the same. And further, that I am well acquainted with the handwriting
 3154 of such justice, and verily believe the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, this 8th day of May, 1847.

JOHN M. HICKS,
Clerk.

State of New York, County of Westchester, ss.:

I, John P. Jenkins, register of deeds, in and for the county of Westchester, do hereby certify that I have

compared the foregoing copy of deed with the original thereof, remaining of record in my office, and that the same is a correct transcript therefrom, and of the whole of such original as recorded in my office, in Liber 3155 120, page 155, &c. I further certify that there is no official seal belonging to this office.

In testimony whereof, I have hereunto set my hand this 1st day of June, A. D. 1859.

JOHN P. JENKINS.

Endorsed—"Samuel E. Johnson, Master in Chancery, to Edwin Forrest. Deed. No. 1. A. C. B."

Exhibit No. 2.

Edwin Forrest to the Sisters of Charity of St. Vincent de Paul:

This indenture, made the twentieth day of December, in the year one thousand eight hundred and fifty-six, between Edwin Forrest, of the city of Philadelphia, in the State of Pennsylvania, party of the first part, and the Sisters of Charity of St. Vincent de Paul, 3156 a benevolent and charitable incorporated society, of the second part, witnesseth, That the said party of the first part, for and in consideration of the sum of one hundred thousand dollars, lawful money of the United States of America, to him in hand paid by the said parties of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, and the said parties of the second part forever released and discharged from the same, by these presents, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey, and confirm unto the 3157 said parties of the second part, and to their successors and assigns, forever, all that certain tract, piece, or parcel of land, situate, lying, and being in the town of Yonkers, county of Westchester, and State of New York, bounded as follows: Beginning at the southeasterly

corner of said tract of land, which corner is formed by the westerly line of land formerly of Bishop Lawrence, and the line dividing the said tract from lands now or late in possession of John Horspool, and running thence

3158 north, along the line of the land formerly of Bishop Lawrence, twenty degrees and fifteen minutes east, sixteen chains and forty-six links, to a point in the southerly line of land formerly of Samuel Lawrence; thence north, along the said lands formerly of Samuel Lawrence, sixty-six degrees and forty minutes west, four chains and thirty-four links, to a point; thence north, still along said last-mentioned land, sixty-seven degrees and forty minutes west, three chains and nineteen links; thence north, still along said land, sixty-one degrees west, five chains and twenty-four links; thence north, still along said land, fifty-four degrees forty minutes-

3159 west, three chains and forty-seven links; thence north, still along said land, sixty-seven degrees and forty minutes west, eighty-five links; thence north, still along said lands, fifty-nine degrees ten minutes west, one chain and seventy-five links; thence north, still along said land, fifty-four degrees thirty-five minutes west, three chains and thirty-three links; thence north, still along said land, fifty-two degrees west, two chains and thirty-four links; thence north, still along said lands, forty-eight degrees and thirty minutes west, one chain and ninety-one links; thence north, still along said lands, forty-four degrees forty-five minutes west, one chain and

3160 eighty-two links; thence north, still along said lands, seventy-one degrees fifteen minutes west, to the Hudson river; thence southerly, along said Hudson river, to land of Lispenard Stewart; thence south, along said Stewart's land, fifty-seven degrees ten minutes east, seven chains and fourteen links, to a point on the southerly side of the road, called the New Road, leading from the road called the Quarry Road, to the residence of Lispenard Stewart and the Hudson river; thence south,

along the southerly side of said New Road, eighty-five degrees and five minutes east, fifty-eight links; thence south, still along the southerly side of said New Road, seventy-six degrees and twenty-five minutes east, two chains and eighty-five links; thence south, still along 3161 the southerly side of said New Road, sixty-eight degrees and five minutes east, one chain; thence south, still along the southerly side of said New Road, sixty-one degrees and thirty-five minutes east, one chain and seventy-three links; thence south, still along the southerly side of said New Road, fifty-five degrees and thirty minutes east, seven chains and twenty links; thence south, still along the southerly side of said New Road, one degree and thirty minutes west, thirty-seven links, to a point on the westerly side of the said Quarry Road; thence south, along said Quarry Road, fifty-three degrees thirty minutes west, one chain and fifty-eight 3162 links, to a point on the westerly side of said Quarry Road, opposite the point where the northerly line of the land of the aforesaid John Horspool strikes the easterly side of said Quarry Road; thence south, across said Quarry Road and along the said line of the land of the said John Horspool, fifty-six degrees and twenty-five minutes east, fifteen chains and seventy-five links, to the place of beginning, containing fifty-four acres and eighty-eight hundredths of an acre, be the same more or less: subject to all the right, title and interest of the Hudson River Railroad Company in so much of the land included within the above boundaries as was 3163 conveyed to them by the said Edwin Forrest, by deed dated July 2d, 1847; and also subject to the rights of the public in so much of the same as forms part of the new public highway leading from the village of Yonkers to Spuyten Duyvel, and subject to such right of way as exists now through and over the road running along the southerly boundary of said premises. Together with all the right, title and interest of the said

party of the first part, of, in and to the land under water, lying in front of and adjoining said premises; and all
 3164 and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and, also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same and every part and parcel thereof, with the appurtenances: To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said parties of the second part, their successors and assigns, to their own proper use, benefit
 3165 and behoof, forever.

And the said Edwin Forrest, for himself, his heirs, executors and administrators, doth covenant, grant and agree, to and with the said parties of the second part, their successors and assigns, that he and they will, at every and all times hereafter, indemnify and save harmless the said parties of the second part, their successors and assigns, of, from and against all dower, alimony, claim of dower or claim of alimony, and of, from and against all damages or payments of money on account of such claim of dower or alimony, of Catherine N. Forrest, the wife of the said Edwin Forrest, in the premises above described, or any part thereof. And the
 3166 said Edwin Forrest, for himself, his heirs, executors and administrators, doth also covenant, grant and agree, to and with the said parties of the second part, their successors and assigns, that the said Edwin Forrest, at the time of the sealing and delivery of these presents, is lawfully seized, in his own right, of a good, absolute and indefeasible estate of inheritance, in fee simple, of, and in all and singular the above granted, bargained and described premises, with the appurtenances, and hath good right, full power and lawful authority to

grant, bargain, sell and convey the same, in manner and form aforesaid.

And that the said parties of the second part, their successors and assigns, shall and may, at all times here- 3167 after, peaceably, quietly, have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons lawfully claiming, or to claim, the same.

And that the same now are free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances of what nature or kind soever, except the dower aforesaid; and also that the said party of 3168 the first part, and his heirs, and all and every other person or persons whomsoever, lawfully or equitably deriving any estate, right, title, or interest of, in or to the hereinbefore granted premises, by, from, under, or in trust for him or them, shall and will, at any time or times, hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said parties of the second part, their successors and assigns, make, do, and execute, or cause or procure to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in 3169 the law, for the better and more effectually vesting and confirming the premises, hereby intended to be granted in and to the said parties of the second part, their successors and assigns, forever, as by the said parties of the second part, their successors or assigns, or their counsel learned in the law, shall be reasonably devised, advised or required. And the said Edwin Forrest and his heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said parties of the

3170 second part, their successors and assigns, against the said party of the first part and his heirs, and against all and every person and persons whomsoever, lawfully claiming, or to claim, the same, shall and will warrant, and by these presents forever defend. In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

EDWIN FORREST, [L. s.]

Sealed and delivered in the presence of }
[word "and," sixth line down, 3d }
side, interlined before execution]

WM. WARBURTON SCRUGHAM, .

G. DOUGLASS BREWERTON.

3171

State of New York, Westchester County, ss. :

On this 9th day of January, one thousand eight hundred and fifty-seven, personally came before me Edwin Forrest, to me known to be the same person described in and who executed the above conveyance, and acknowledged that he executed the same.

H. W. BASHFORD,

Justice of the Peace.

A true copy of the original deed, and acknowledgment thereof, recorded, February 3d, 1857, at 9 o'clock 5 minutes, A. M.

JOHN P. JENKINS, *Clerk.*

3172 *State of New York, County of Westchester, ss. :*

I, John P. Jenkins, Register of Deeds, in and for the county of Westchester, do hereby certify, that I have compared the foregoing copy deed with the original thereof, remaining of record in my office, and that the same is a correct transcript therefrom, and of the whole of such original, as recorded in my office, in Liber 348 of Deeds, page 329, &c. I further testify, that there is no official seal belonging to this office. In testimony

whereof, I have hereunto set my hand, this 1st day of June, A. D. 1859.

JOHN P. JENKINS, *Reg.*

Endorsed—"Edwin Forrest to the Sisters of Charity of St. Vincent de Paul. Deed. No. 2. A. C. B." 3173

Exhibit No. 3.

This Indenture, made the fourteenth day of August, in the year one thousand eight hundred and forty-nine, between James Valentine, of the town of Yonkers, in the county of Westchester, and Isabella, his wife, and James L. Valentine, of the same place, parties of the first part, and Edwin Forrest, of the same place, party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of nine thousand dollars, lawful money of the United States, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknow- 3174
ledged, and the said party of the second part, his heirs, executors and administrators, forever released and discharged from the same, by these presents, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever, all that certain piece, or parcel, or tract of land, situate, lying and being in the town of Yonkers, county of Westchester, and State of New York, bounded and described as follows, viz.: beginning at the most south-easterly corner of the parcel of land hereby 3175
intended to be conveyed, adjoining land of the said Edwin Forrest, and at the south-westerly corner of John Crisfield's land, and running thence north, sixty-five degrees, west, along the said Forrest's land by the line of the farm formerly known as the "Aaron Warner farm," as the same was conveyed by Andrew Findlay, in the year 1838, eighty links; thence north, sixty degrees and fifteen minutes, west, still along the said line, five

chains; thence north, fifty-eight degrees and thirty minutes, west, still along the said line, ten chains; thence north, fifty-two degrees, west, still along the

3176 said line, five chains; thence north, seventy-four degrees, west, still along said line, passing four links northerly of a large chestnut tree, and through a large hemlock tree on the top of the bank of the Hudson river, six chains, to common high water mark of the Hudson river, north, twenty-six degrees, east, eight chains and thirty-one links, to other land of the said parties of the first part; thence south, sixty-two degrees and thirty minutes, east, along the said land of the said parties of the first part, ten chains and seventy-seven links, to a cross stone fence, running southerly; thence south, sixty-five degrees and forty-five minutes, east, still along the said

3177 land of the said parties of the first part, in a straight line, fifteen chains and thirteen links, to land of Nathaniel Post; thence, along the said Nathaniel Post's land, and along the land of John Crisfield, south, twenty-three degrees and fifteen minutes, west, ten chains and seventy-three links, to the place of beginning, containing twenty-three acres and seventy-three hundredths of an acre ($23\frac{73}{100}$ acres) of land, be the same more or less, together with all the right, title and interest of the said parties of the first part (if any they have), of, in and to the land, and land under the water, lying between the westerly boundary of the land above described and the centre of the Hudson river. Also,

3178 together with a right of way over a strip of land, belonging to the said parties of the first part, of two rods in width, extending along the land of Nathaniel Post from the north-easterly corner of the land hereby conveyed, to the private road or lane leading from the Old Albany Post Road to the dock of the said parties of the first part, on the Hudson river, and also, a right of way over the said private road or lane, from the westerly boundary of said Nathaniel Post's land, to the Old Albany Post

Road, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits 3179 thereof; and also, all the estate, right, title, interest, dower and right of dower, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances, to have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof forever. And the said James Valentine and James L. Valentine, for themselves, their heirs, executors and administrators, do covenant, grant and agree, to and with the 3180 said party of the second part, his heirs and assigns, that the said James Valentine and James L. Valentine, at the time of the sealing and delivery of these presents, is lawfully seized, in his own right, of a good, absolute and indefeasible estate of inheritance, in fee simple, of, and in all and singular the above granted and described premises, with the appurtenances, and have good right, full power and lawful authority, to grant, bargain, sell and convey the same, in manner aforesaid; and that the said party of the second part, his heirs and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel 3181 thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said parties of the first part, their heirs or assigns, or of any other person or persons lawfully claiming or to claim the same; and that the same now are free, clear, discharged and unencumbered, of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances of what nature or kind soever.

And also, that the said parties of the first part, and their heirs, and all and every person or persons whom-
 3182 soever, lawfully or equitably deriving any estate, right, title or interest, of, in, or to the herein before granted premises, by, from, under or in trust for them, shall and will, at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and assigns, make, do and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted or so intended to be, in and to the said party of
 3183 the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably advised or required ; and the said James Valentine and James L. Valentine, and their heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said parties of the first part, and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

3184 In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

JAMES VALENTINE, [L. s.]

ISABELLA B. VALENTINE, [L. s.]

JAMES L. VALENTINE, [L. s.]

Sealed and delivered in the presence of
 [the word "Isabella" having been
 written over an erasure on the fourth
 line of the first page, before execution]

JNO. CRISFIELD.

Westchester County, ss. :

On this fourteenth day of August, in the year of our Lord one thousand eight hundred and forty-nine, personally came before me James Valentine and Isabella 3185 his wife, and James L. Valentine, to me severally, personally known to be the individuals described in and who executed the above conveyance, and severally acknowledged that they executed the same ; and the said Isabella, on a private examination before me, separate and apart from her husband, acknowledged that she executed the same freely and without any fear or compulsion of or from her said husband.

JNO. CRISFIELD,

Justice of the Peace.

A true copy of the original deed and acknowledgment thereof, recorded August 22d, 1849, at half-past 10 o'clock, A. M.

3186

MUNSON S. LOCKWOOD,

Clerk.

State of New York, County of Westchester :

I, John P. Jenkins, Register of the county of Westchester, do hereby certify that I have compared the foregoing copy with the original deed as recorded in my office, in Liber 136 of Deeds, page 430, August 22, 1849, and the same is a correct transcript thereof, and the whole of such record, and that there is no official seal attached to said office of Register.

Given under my hand this 7th day of June, 1859.

JOHN P. JENKINS,

Register. 3187

Endorsed—"Liber 136 of Deeds, page 430. James Valentine and others to Edwin Forrest. Certified copy. Deed. No. 3. A. C. B. Register's office, Westchester County."

Exhibit No. 4.

*The People of the State of New York to Caleb S. Marshall
and Philip Warren, greeting :*

We command you, that all business and excuses
being laid aside, you appear and attend before
[L. s.] Alvin C. Bradley, Esquire, referee appointed
by the Superior Court of the city of New
York in the action hereinafter mentioned, and you are
3188 required to appear before said referee, at his office, No.
74 Wall street, in the city of New York, on the 9th day
of June, 1859, at four o'clock in the afternoon, to testify
and give evidence in a certain action, now pending and
undetermined, in the said Court, between Catharine N.
Forrest, plaintiff, and Edwin Forrest, defendant, on the
part of the plaintiff, and that you bring with you and pro-
duce, at the time and place aforesaid, the receipt books,
loose receipts, vouchers, drafts, and orders in reference
to each and every payment of money made to said
Edwin Forrest by the owners, managers, treasurers or
3189 agents, for or on account of his services or engagements
as a performer in said theatre, or for playing, acting, or
performing at said Broadway Theatre as an actor, at
the following times :

From and including the 15th day of September, 1851,
to and including the 28th day of September 1851.

From and including the 24th day of November, 1851,
to and including the 30th day of November, 1851.

From and including the 9th day of February, 1852, to
and including the 30th day of April, 1852.

For the 7th day of July, 1852.

From and including the 20th day of September, 1852,
to and including the 23d day of October, 1852.

3190

From and including the 21st day of February, 1853, to
and including the 26th day of February, 1853.

From and including the 7th day of March, 1853, to and
including the 24th day of May, 1853.

From and including the 19th day of September, 1853,
to and including the 8th day of October, 1853.

From and including the 13th day of March, 1854, to
and including the 8th day of April, 1854.

From and including the 18th day of September, 1854,
to and including the 8th day of October, 1854.

From and including the 19th day of March, 1855, to 3191
and including the 5th day of May, 1855.

From and including the 8th day of October, 1855, to
and including the 27th day of October, 1855.

From and including the 5th day of January, 1857, to
and including the 6th day of February, 1857.

From and including the 16th day of February, 1857, to
and including the 23d day of February, 1857.

For the 6th day of March, 1857.

And also showing all moneys received by said Edwin Forrest for his share or interest in the moneys arising from the said Broadway Theatre, during all the several times aforesaid, either as a player, actor, drama- 3192
tist, tragedian, or otherwise. And also all other books or papers containing any accounts or statements in reference to such payments to, and receipt by, the said Edwin Forrest, of such moneys; and especially all checks, check books, return books, and cash books, kept of or concerning the business of said Broadway Theatre, during all the times aforesaid, now in your custody, or under your control, and all other evidences . and writings which you have in your custody, or power, concerning the premises. And for a failure to attend and produce such papers, you will be deemed guilty of 3193
a contempt of Court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness, the Honorable Joseph S. Bosworth, Justice
of said Superior Court of the city of New York, at the
City Hall, in the city of New York, the eighth day of

June, in the year of our Lord one thousand eight hundred and fifty-nine.

GEORGE T. MAXWELL,
Clerk.

3194 HOWLAND & CHASE,
Attorneys for Plaintiff,
46 Exchange Place, New York.

Endorsed—"Superior Court of the City of New York. Catharine N. Forrest, plaintiff, *against* Edwin Forrest, defendant. Subpœna duces tecum. Howland & Chase, attorneys for plaintiff. To Caleb S. Marshall, Esq. No. 4. A. C. B."

Exhibit No. 5.

This Indenture, made the eighth day of March, in the year one thousand eight hundred and fifty-six, between Edwin Forrest, of the city of Philadelphia, and State of Pennsylvania, party of the first part; and Horace Beals, of the city and State of New York, party of the
3196 *second part, witnesseth: that the said party of the first part, for and in consideration of the sum of fourteen thousand one hundred dollars, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs, executors and administrators, forever released and discharged from the same, by these presents, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, and*
3196 *to his heirs and assigns forever, all that certain brick dwelling-house and lot, piece or parcel of land and premises, situate, lying, and being in the Sixteenth Ward of the city of New York, on the northerly side of Twenty-first street, between Ninth and Tenth avenues, and known as number (273) two hundred and seventy-three, West Twenty-first street,*

bounded and containing as follows: Beginning at a point on the northerly side of Twenty-first street, distant two hundred and eighty-four (284) feet seven (7) inches westerly from the northwesterly corner of Twen- 3197
ty-first street and Ninth avenue, and running thence westerly along Twenty-first street, twenty-one (21) feet five (5) inches; thence northerly, and through the centre of the party wall erected on the lot adjoining, and known as number (275) two hundred and seventy-five, West Twenty-first street, and between the same and the house erected on the lot hereby conveyed, one hundred and four (104) feet; thence easterly, and in a line parallel to Twenty-first street, twenty-one (21) feet five (5) inches; and thence southerly, and in a line parallel to Ninth avenue, and through the centre of the party wall between the house erected on the lot adjoining, and 3198
known as number (271) two hundred and seventy-one West Twenty-first street, one hundred and four (104) feet to Twenty-first street, the point or place of beginning; said lot being twenty-one (21) feet five (5) inches in width, in front and rear, and one hundred and four (104) feet in depth on each side. Also all those two certain lots, pieces or parcels of land and premises, situate, lying and being in the Sixteenth Ward of the city of New York, on the northerly side of Twenty-first street, between Ninth and Tenth avenues, and known as numbers (275) two hundred and seventy-five and (277) two hundred and seventy-seven West Twenty-first street, 3199
and which said two lots, taken together, are bounded and contain as follows: Beginning at a point on the northerly side of Twenty-first street, distant (306) three hundred and six feet westerly from the north-westerly corner of Twenty-first street and Ninth avenue, and running thence westerly along Twenty-first street, forty-four (44) feet; thence northerly, and in a line parallel to Ninth avenue, one hundred and four (104) feet; thence easterly and in a line parallel to Twenty-first street,

forty-four (44) feet, and thence southerly and through
 the centre of the party wall, between the house erected
 3200 on the lot adjoining, and known as number (273) two
 hundred and seventy-three West Twenty-first street,
 and hereinbefore described, and the party wall erected
 on one of the lots hereby conveyed, and known as num-
 ber (275) two hundred and seventy-five West Twenty-
 first street, one hundred and four (104) feet to Twenty-
 first street, at the point or place of beginning ; said two
 lots, taken together, being forty-four (44) feet in width
 in front and rear, and one hundred and four (104) feet in
 depth on each side ; together with all and singular the
 tenements, hereditaments and appurtenances thereunto
 belonging, or in any wise appertaining, and the reversion
 3201 and reversions, remainder and remainders, rents, issues and
 profits thereof. And also all the estate, right, title, interest,
 property, possession, claim and demand whatsoever, as
 well in law as in equity, of the said party of the first part,
 of, in and to the same, and every part and parcel thereof,
 with the appurtenances : To have and to hold the above
 granted, bargained and described premises, with the ap-
 purtenances, unto the said party of the second part, his
 heirs and assigns, to his and their own proper use, bene-
 fit and behoof forever ; subject to all the covenants con-
 cerning the occupation of the said premises hereby
 granted, and the construction of buildings thereon, con-
 3202 tained in the deed dated August 5th, 1843, made by
 Clement C. Moore to Edwin Forrest, and recorded in
 Register's office of the city of New York, in Liber 437
 of Conveyances, page 629, September 9th, 1843. And
 the said party of the second part, for himself and his
 legal representatives, doth hereby covenant and agree, to
 and with the said party of the first part hereto, that he
 will keep and observe all and every the said covenants
 and agreements contained in said deed. And the said
 Edwin Forrest, for himself, his heirs, executors and ad-
 ministrators, doth covenant, grant and agree, to and with

the said party of the second part, his heirs and assigns, 3203 that the said Edwin Forrest, at the time of the sealing and delivery of these presents, is lawfully seized, in his own right, of a good, absolute and indefeasible estate of inheritance, in fee simple, of, and in all and singular the above granted and described premises, with the appurtenances, subject to the inchoate right of dower of Catharine N. Forrest, and hath good right, full power and lawful authority, to grant, bargain, sell and convey the same, in manner aforesaid : And that the said party of the second part, his heirs and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, 3204 use, occupy, possess and enjoy, the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons lawfully claiming or to claim the same ; and in particular the said party of the first part doth, for himself, his heirs, executors and administrators, covenant, promise, and agree, to and with the said party of the second part, his heirs and assigns, well and truly to indemnify and save harmless the said party of the second part, his heirs, 3205 executors, administrators and assigns, of and from the inchoate right of dower of Catharine N. Forrest, the wife of the said party of the first part, and all claims, demands, controversies, actions, damages, or sums of money to arise, or to become payable by reason thereof: And that the same now are free, clear, discharged and unencumbered, of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumbrances, of what nature or kind soever, except as aforesaid : And also, that the said party of the first part, and his heirs, and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title, or interest, of, in or to the hereinbefore 3206 granted premises, by, from, under or in trust for him, or

them, shall and will, at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and assigns, make, do and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law, for the better and more effectually

3207 vesting and confirming the premises hereby granted or so intended to be, in and to the said party of the second part, his heirs and assigns, forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably advised or required; And the said Edwin Forrest and his heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part, and his heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presents for-

3208 ever defend.

In witness whereof, the said parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

EDWIN FORREST, [L. s.]

Signed, sealed and delivered, }
in the presence of }

J. WARREN LAWTON.

City and County of New York, ss.:

On the 15th day of March, A. D. 1856, before me personally came Edwin Forrest, known to me to be the person described in and who executed the foregoing conveyance, and he acknowledged that he executed the

3209 same.

SYLVESTER LAY,
Com. of Deeds.

Recorded the preceding at the request of J. & J. Halstead, March 17, 1856, at 1 o'clock, P. M.

JOHN J. DOANE,

Reg.

Register's Office, City and County of New York.

I have compared the preceding with an instrument in this office, recorded in Liber No. 701 of Conveyances, page 443, March 17th, 1856, at 1 o'clock, P. M., and certify the preceding to be a full and correct transcript of said record. I further certify that there is no official seal belonging to this office. Dated, this 3d day of 3210 January, 1859.

THOS. C. ACTON,

Dep. Reg.

Endorsed—"Edwin Forrest to Horace Beals. No. 5. A. C. B."

Exhibit 6.

STATEMENT of Cash paid Mr. E. Forrest, for services at the Broadway Theatre, New York, from Sept., 1851, to April, 1857, inclusive.

1851.

| | | | | | |
|-------|-----|------|-------|----------|------------|
| Sept. | 10, | Cash | ..... | \$5 25 | |
| " | 13, | " | ..... | 2 00 | |
| " | 17, | " | ..... | 529 43 | |
| " | 19, | " | ..... | 301 50 | |
| " | 19, | " | ..... | 318 62 | |
| " | 20, | " | ..... | 277 12 | 3211 |
| " | 23, | " | ..... | 536 31 | |
| " | 24, | " | ..... | 900 31 | |
| " | 26, | " | ..... | 660 81 | |
| " | 27, | " | ..... | 551 87 | |
| " | 29, | " | ..... | 294 87 | |
| | | | | <hr/> | \$4,378 09 |
| Nov. | 28, | " | ..... | 1,389 00 | |
| Dec. | 2, | " | ..... | 5 00 | |
| " | 3, | " | ..... | 445 18 | |
| | | | | <hr/> | 1,839 18 |

1852.

| | | | |
|------|-------|-------------|----------|
| | Feb'y | 10, Cash | \$517 37 |
| | " | 11, " | 257 75 |
| 3212 | " | 12, " | 284 81 |
| | " | 13, " | 271 25 |
| | " | 13, " | 1 00 |
| | " | 14, " | 438 87 |
| | " | 16, " | 2 50 |
| | " | 16, " | 376 75 |
| | " | 17, " | 430 50 |
| | " | 18, " | 1 50 |
| | " | 21, " | 40 00 |
| | " | 23, " | 2 00 |
| | " | 24, " | 896 06 |
| | " | 25, " | 443 75 |
| | " | 25, " | 10 00 |
| | " | 25, " | 3 00 |
| | " | 26, " | 252 75 |
| | " | 26, Tickets | 2 00 |
| | " | 27, Cash | 219 62 |
| | " | 27, Tickets | 2 00 |
| | " | 28, " | 1 00 |
| | March | 2, Cash | 546 00 |
| | " | 4, " | 250 37 |
| | " | 8, " | 334 87 |
| 3213 | " | 9, " | 3 50 |
| | " | 9, Tickets | 2 00 |
| | " | 10, Cash | 604 56 |
| | " | 11, Tickets | 3 50 |
| | " | 12, Cash | 512 25 |
| | " | 13, " | 1 00 |
| | " | 15, " | 384 12 |
| | " | 16, " | 1 00 |
| | " | 17, " | 1 50 |
| | " | 19, " | 1 00 |
| | " | 19, " | 5 00 |
| | " | 22, " | 1,146 75 |

| | | | |
|-------|-------------------|-------------|------|
| March | 24, Cash | \$2 00 | |
| " | 25, " | 532 12 | |
| " | 25, Tickets | 3 50 | |
| " | 26, " | 1 50 | |
| " | 29, Cash | 638 37 | |
| " | 29, Tickets | 1 00 | |
| " | 31, " | 5 00 | |
| April | 1, " | 1 50 | 3214 |
| " | 3, " | 1 00 | |
| " | 5, Cash | 1,077 93 | |
| " | 5, Tickets | 3 00 | |
| " | 5, Cash | 45 00 | |
| " | 7, " | 5 00 | |
| " | 7, Tickets | 1 00 | |
| " | 12, " | 3 00 | |
| " | 16, Cash | 1,207 43 | |
| " | 20, " | 1,164 31 | |
| " | 24, Tickets | 2 00 | |
| " | 26, " | 2 00 | |
| " | 27, Cash | 1,000 75 | |
| " | 27, Tickets | 2 00 | |
| " | 28, " | 2 50 | |
| May | 6, Cash | 10 00 | |
| " | 7, " | 1,087 12 | |
| " | 7, " | 20 00 | |
| | | <hr/> | |
| | | \$15,067 93 | |
| Sep. | 18, Cash | 6 00 | |
| " | 21, " | 10 00 | |
| " | 22, " | 18 00 | 3215 |
| " | 23, " | 996 18 | |
| " | 27, " | 913 31 | |
| " | 30, " | 925 68 | |
| Oct. | 4, " | 745 81 | |
| " | 7, " | 873 50 | |
| " | 11, " | 599 87 | |
| " | 14, " | 810 43 | |
| " | 18, " | 584 50 | |

| | | | | | |
|------------|-----|------|-------|----------|-------------|
| Oct. | 22, | Cash | ..... | \$870 62 | |
| " | 25, | " | ..... | 810 00 | |
| | | | | <hr/> | \$8,163. 90 |
| 1853. | | | | | |
| Feb'y | 9, | " | ..... | 6 00 | |
| " | 24, | " | ..... | 50 00 | |
| " | 28, | " | ..... | 29 | |
| 3216 March | 1, | " | ..... | 1,955 46 | |
| " | 14, | " | ..... | 1,478 00 | |
| " | 21, | " | ..... | 1,580 25 | |
| " | 29, | " | ..... | 1,100 00 | |
| April | 4, | " | ..... | 1,343 00 | |
| " | 11, | " | ..... | 1,004 00 | |
| " | 13, | " | ..... | 50 | |
| " | 18, | " | ..... | 984 00 | |
| " | 25, | " | ..... | 985 00 | |
| " | 26, | " | ..... | 25 | |
| May | 2, | " | ..... | 832 00 | |
| " | 9, | " | ..... | 1,434 00 | |
| " | 13, | " | ..... | 1,434 00 | |
| " | 20, | " | ..... | 5 00 | |
| " | 23, | " | ..... | 382 63 | |
| " | 24, | " | ..... | 50 | |
| | | | | <hr/> | 13,140 88 |
| Sep. | 22, | " | ..... | 1,107 37 | |
| " | 26, | " | ..... | 948 87 | |
| 3217 " 29, | " | " | ..... | 899 75 | |
| Oct. | 3, | " | ..... | 924 12 | |
| " | 6, | " | ..... | 1,179 12 | |
| " | 8, | " | ..... | 718 25 | |
| " | 8, | " | ..... | 60 00 | |
| " | 8, | " | ..... | 344 42 | |
| | | | | <hr/> | 6,181 90 |
| 1854. | | | | | |
| March | 2, | " | ..... | 8 00 | |
| " | 16, | " | ..... | 1,109 87 | |
| " | 20, | " | ..... | 833 87 | |

| | | | |
|-------|------------|----------|------|
| March | 23, Cash | \$887 87 | |
| " | 27, " | 907 12 | |
| " | 30, " | 896 87 | |
| " | 31, " | 25 00 | |
| April | 3, " | 964 75 | |
| " | 6, Tickets | 6 00 | |
| " | 7, Cash | 851 50 | |
| " | 11, " | 30 00 | |
| " | 8, " | 50 00 | 3218 |
| " | 10, " | 709 62 | |

 \$7,280 47

| | | | |
|-------|----------|----------|--|
| Sept. | 15, Cash | 5 00 | |
| " | 22, " | 1,127 00 | |
| " | 22, " | 5 00 | |
| " | 25, " | 612 12 | |
| " | 28, " | 868 75 | |
| Oct. | 2, " | 645 62 | |
| " | 5, " | 994 25 | |
| " | 6, " | 25 00 | |
| " | 6, " | 552 87 | |
| " | 7, " | 25 00 | |
| " | 7, " | 100 00 | |
| " | 9, " | 166 00 | |

 5,096 61

1855.

| | | | |
|-------|---------|--------|------|
| March | 8, Cash | 4 75 | |
| " | 9, " | 25 | 3219 |
| " | 23, " | 954 62 | |
| " | 26, " | 645 87 | |
| " | 27, " | 608 62 | |
| April | 2, " | 599 12 | |
| " | 5, " | 666 25 | |
| " | 7, " | 16 50 | |
| " | 9, " | 470 00 | |
| " | 12, " | 524 75 | |
| " | 12, " | 20 00 | |
| " | 16, " | 491 75 | |

| | | | |
|----------|--------------------|----------|-------------------|
| April | 19, Cash | \$653 50 | |
| " | 23, " | 391 62 | |
| " | 26, " | 458 00 | |
| " | 26, " | 10 00 | |
| " | 30, " | 341 50 | |
| May | 3, " | 371 50 | |
| " | 5, " | 100 00 | |
| 3220 | " 7, " | 498 87 | |
| | | | <hr/> \$7,827 49 |
| Oct. | 4, Cash | 3 75 | |
| " | 5, " | 5 00 | |
| " | 12, " | 10 00 | |
| " | 16, " | 1,400 00 | |
| " | 18, " | 25 00 | |
| " | 20, " | 50 00 | |
| " | 22, " | 694 12 | |
| " | 27, " | 50 00 | |
| " | 29, " | 1,379 37 | |
| | | | <hr/> 3,617 24 |
| 1857. | | | |
| Jan. | 2, Cash | 6 00 | |
| " | 12, " | 1,268 75 | |
| " | 19, " | 1,167 75 | |
| " | 23, " | 20 00 | |
| " | 24, " | 691 62 | |
| 3221 | " 28, " | 1 00 | |
| Feb. | 2, " | 562 75 | |
| | | | <hr/> 3,717 87 |
| Feb. | 16, Cash | 981 62 | |
| April | 4, Draft on Phila. | 1,318 75 | |
| | | | <hr/> 2,300 37 |
| Total... | | | <hr/> \$78,611 91 |

A.

AMOUNTS OF MONEYS PAID *Mr. E. Forrest, at Broadway
Theatre, New York.*

| | |
|---|---------------|
| From and including the 15th day of Sept.,
1851, to and including the 28th day of
Sept., 1851..... | \$4,378 09 |
| 1. From and including the 24th day of
Nov., 1851, to and including the 30th
day of Nov., 1851..... | 1,839 18 3222 |
| 2. From and including the 9th day of Feb.,
1852, to and including the 30th day of
April, 1852 | 15,067 93 |
| 3. For the 7th day of July, 1852 | — |
| 4. From and including the 20th Sept., 1852,
to and including the 23d Oct., 1852... | 8,163 90 |
| 5. From and including the 26th Feb., 1853,
to and including the 24th May, 1853.. | 13,140 88 |
| 6. From and including the 19th Sept., 1853,
to and including the 8th Oct., 1853... | 6,181 90 |
| 7. From and including the 13th March,
1854, to and including the 18th April,
1854..... | 7,280 47 |
| 8. From and including the 18th Sept., 1854,
to and including the 8th Oct., 1854... | 5,096 61 3223 |
| 9. From and including the 19th Mch., 1855,
to and including the 5th May, 1855... | 7,827 47 |
| 10. From and including the 8th Oct., 1855,
to and including the 27th Oct., 1855.. | 3,617 24 |
| 11. From and including the 5th Jan., 1857,
to and including the 6th Feb., 1857 .. | 3,717 87 |
| 12. From and including the 16th Feb., 1857,
to and including the 6th March, 1857. | 2,300 37 |
| Total..... | \$78,611 91 |

No. 6, A. C. B.

Exhibit No. 7.

3224 *This Indenture*, made the first day of May, in the year one thousand eight hundred and thirty-eight, between Elijah Yerks, of the city and county of New York, counsellor at law, of the first part, and Edwin Forrest, of the same place, gentleman, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one thousand one hundred and fifty dollars, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs, executors, and

3225 administrators, forever released and discharged from the same, by these presents, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever, all that certain lot, piece, or parcel of land, situate, lying, and being in the town of New Rochelle, county of Westchester, and State of New York, and known on the map of property at New Rochelle, made by Alexander Martin, Surveyor, and on file in the office of the Clerk of the county of Westchester, as lot number 2 (two), and

3226 is bounded and contains as follows, viz.: easterly, in front, on Drake's Lane, and extending along the same, two hundred feet; northerly, on one side, by lot number three (3), and extending along the same five hundred feet; westerly, in the rear, by lot number thirty-two (32), and extending along the same two hundred feet; and southerly, on the other side, by lot number one (1), and extending along the same five hundred feet. Being a part of the premises conveyed by deed by Samuel Young, Esq., Master in Chancery, to Abraham H. Van Wyck, of the city and county of New York, aforesaid, merchant: Together with all and

3227 singular the tenements, hereditaments, and appur-

tenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof: And also, all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their 3228 own proper use, benefit, and behoof forever. And the said Elijah Yerks, for himself, his heirs, executors, and administrators, doth hereby covenant, grant, and agree to and with the said party of the second part, his heirs and assigns, that the said Elijah Yerks, at the time of the sealing and delivery of these presents, was lawfully seized, in his own right, of a good, absolute and indefeisible estate of inheritance, in fee simple, of, and in all and singular the above granted and described premises, with the appurtenances, and hath good right, full power, and lawful authority, to grant, bargain, sell and convey the same, in manner aforesaid: And that the said party of the second part, his heirs and assigns, shall 3229 and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons lawfully claiming or to claim the same: And that the same now are free, clear, discharged and unincumbered, of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumbrances of what nature or kind soever. And also, that the said party of the first part, and his 3230 heirs, and all and every person or persons whomsoever,

lawfully or equitably deriving any estate, right, title, or interest, of, in or to the hereinbefore granted premises, by, from, under, or in trust for him or them, shall and will, at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and assigns, make, do and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law, for the better and more effectually vesting and

3231 confirming the premises hereby granted, or so intended to be, in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably advised or required: And the said Elijah Yerks, his heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part, and his heirs, and against all and every person or persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

3232 In witness whereof, the said parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

ELIJAH YERKS, [L. s.]

Sealed and delivered in }
the presence of }

D. P. INGRAHAM.

City and County of New York, ss.:

On the first day of May, 1838, Elijah Yerks, known to me to be the person described in and who executed the foregoing conveyance, acknowledged before me that he executed the same.

D. P. INGRAHAM,

3233

*Judge of the New York Common Pleas
and Counsellor Sup. Court.*

A true copy of the original deed and acknowledgment thereof. Recorded May 2d, 1838, at 1 o'clock, P.M.

JOHN H. SMITH,
Clerk.

State of New York, Westchester County, Register's Office, ss. :

I, John P. Jenkins, Register of the County of Westchester, do hereby certify that I have compared the preceding copy deed with the original record thereof, and that it is a true transcript thereof, and of the whole thereof, as the same is entered in said office in Liber 79 3234 of Deeds, page 515, &c. And I further certify that there is no official seal attached to said office.

In testimony whereof I have hereunto set my hand, at White Plains, in said county, the 20th day of June, A. D. 1859.

JOHN P. JENKINS,
Reg'r.

Endorsed—"Dated 185 , Elijah
Yerks to Edwin Forrest. Deed. Ex. No. 7. A. C. B.
Certified copy."

IN THE SUPERIOR COURT OF THE CITY OF
NEW YORK.

CATHARINE N. FORREST

against

EDWIN FORREST.

3235

Ex. No. 8.
A. C. B.

Please take notice that we are retained for the defendant in this action, and, as his attorneys therein, demand service on us, at our office, No. 39 Wall street, New

York city, of a copy of the plaintiff's complaint in the same.

Nov. 19, 1850.

VAN BUREN & ROBINSON,
Def't's. Attys.

3236 To HOWLAND & CHASE,

Plff's Attys.

Endorsed—"In the Superior Court of the City of New York. Catharine N. Forrest *vs.* Edwin Forrest. Notice of Appearance. To Mr. Howland & Chase. Received Nov'r 19, 1850."

Exhibit No. 9.

This Indenture, made the eighth day of March, in the year one thousand eight hundred and fifty-six, between Edwin Forrest, of the city of Philadelphia, and State of Pennsylvania, party of the first part, and John G. Cameron, of the city of New York, party of the second part, Witnesseth, That the said party of the first part, for and in consideration of the sum of
3237 six thousand seven hundred and fifty dollars, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the en-sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs, executors and administrators, forever released and discharged from the same, by these presents, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever, All that
3238 certain brick dwelling-house and lot, piece or parcel of land and premises, situate, lying and being in the Sixteenth Ward of the city of New York, on the north-erly side of Twenty-first street, between Ninth and Tenth avenues, and known and distinguished as number 271 (two hundred and seventy-one), West Twenty-first street, bounded and containing as follows: be-

ginning at a point on the northerly side of Twenty-first street, distant two hundred and sixty-two (262) feet eight (8) inches westerly from the north-westerly corner of Twenty-first street and Ninth avenue, and run- 3239
 ning thence westerly along Twenty-first street, twenty-one (21) feet eleven (11) inches; thence northerly, and on a line parallel to Ninth avenue, and through the centre of the party wall between the house erected on the adjoining, and known as number 273 (two hundred and seventy-three) West Twenty-first street, and the house erected on the lot hereby conveyed, one hundred and four (104) feet; thence easterly and in a line parallel to Twenty-first street, twenty-one (21) feet eleven (11) inches; and thence southerly and in a line parallel to Ninth avenue, and through the centre of the party 3240
 wall, between the house erected on the lot adjoining, and known as number 269. (two hundred and sixty-nine) West Twenty-first street, and the house erected on the lot hereby conveyed, one hundred and four (104) feet to Twenty-first street, the point or place of beginning; said lot being twenty-one (21) feet eleven inches in width, front and rear, and one hundred and four (104) feet in depth, on each side. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof: And 3241
 also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his, their own proper use, benefit and behoof forever. Subject to all the covenants concerning the occupation of the said premises,

hereby granted, and the construction of buildings
 3242 thereon, contained in the deed, dated August 5th, 1843,
 made by Clement C. Moore, to Edwin Forrest, and
 recorded in Register's office, of the city of New York,
 in Liber 437 on Cons., page 629, September 9th,
 1843. And the said party of the second part, for himself
 and his legal representatives, doth hereby covenant and
 agree, to and with the said party of the first part here-
 to, that he will keep and observe all and every the
 said covenants and agreements contained in said deed.
 And the said Edwin Forrest, for himself, his heirs,
 executors and administrators, doth covenant, grant and
 3243 agree, to and with the said party of the second part,
 his heirs and assigns, that the said Edwin Forrest, at
 the time of the sealing and delivery of these presents,
 is lawfully seized, in his own right, of a good, absolute
 and indefeasible estate of inheritance, in fee simple, of,
 and in all and singular the above granted and described
 premises, with the appurtenances, subject to the in-
 choate right of dower of Catharine N. Forrest, and
 hath good right, full power and lawful authority, to
 grant, bargain, sell and convey the same, in manner
 3244 aforesaid: And that the said party of the second part,
 his heirs and assigns, shall and may, at all times here-
 after, peaceably and quietly have, hold, use, occupy,
 possess and enjoy the above granted premises, and
 every part and parcel thereof, with the appurtenances,
 without any let, suit, trouble, molestation, eviction, or
 disturbance of the said party of the first part, his heirs
 or assigns, or of any other person or persons, lawfully
 claiming, or to claim the same, and in particular the
 said party of the first part doth, for himself, his heirs,
 executors and administrators, covenant, promise and
 agree, to and with the said party of the second part,
 his heirs, executors, administrators and assigns, well
 3245 and truly to indemnify and save harmless the said
 party of the second part, his heirs, executors, adminis-

trators or assigns, of and from the inchoate right of dower of Catharine N. Forrest, the wife of the said party of the first part, and all claims, demands, controversies, actions, damages, or sums of money to arise, or to become payable by reason thereof: And that the same now are free, clear, discharged and unencumbered, of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumbrances of what nature or kind soever except as aforesaid. And also, that the said party of the first part, 3246 and his heirs, and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title or interest, of, in or to the hereinbefore granted premises, by, from, under or in trust for him, them, shall and will, at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and assigns, make, do and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted 3247 or so intended to be, in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably advised or required; And the said Edwin Forrest,

heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part, and his heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will 3248 warrant, and by these presents forever defend.

In witness whereof, the said parties of the first part

have hereunto interchangeably set their hand and seal,
the day and year first above written.

EDWIN FORREST, [L.s.]

Signed, sealed and delivered }
in the presence of }

J. WARREN LAWTON.

3249 *City and County of New York, ss. :*

On the 15th day of March, A. D. 1856, before me personally came Edwin Forrest, known to me to be the individual described in and who executed the foregoing conveyance, and he acknowledged that he executed the same.

SYLVESTER LAY,

Com. of Deeds.

Recorded the preceding at the request of C. J. and E. De Witt, March 15, 1856, at 3 o'clock and 50 mins. P. M.

JOHN J. DOANE,

Reg.

Register's Office, City and County of New York :

I have compared the preceding with an instrument 3250 in this office, recorded in Liber No. 705 of Conveyances, page 149, March 15th, 1856, at 3 o'clock and 50 minutes P. M., and certify the preceding to be a full and correct transcript of said record. I further certify that there is no official seal belonging to this office. Dated this 4th day of June, A. D. 1859.

THOS. C. ACTON,

Dep. Reg.

Endorsed—“Edwin Forrest to John G. Cameron.
Copy of Deed. Ex. No. 9. A. C. B.”

Exhibit No. 10.

This Indenture, made the eighth day of March, in the 3251 year one thousand eight hundred and fifty-six, between Edwin Forrest, of the city of Philadelphia and State of Pennsylvania, party of the first part, and Jane Cameron

and Euphemia Cameron, of the city and State of New York, single women, parties of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of five thousand five hundred dollars, lawful money of the United States, to him in hand paid by the said parties of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said parties of the second part, their heirs, executors and administrators, forever released and discharged from the same, by 3252 these presents, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm, unto the said parties of the second part, and to their heirs and assigns forever, all that certain brick dwelling-house and lot, piece, or parcel of land and premises, situate, lying and being in the Sixteenth Ward of the city of New York, on the southerly side of Twenty-second street, between Ninth and Tenth avenues, and known and distinguished as number 282 (two hundred and eighty-two) West Twenty-second street, bounded and containing as follows: beginning 3253 at a point on the southerly side of Twenty-second street, distant two hundred and fifty-eight feet three inches westerly from the south-westerly corner of Twenty-second street and Ninth avenue, and running thence, westerly, along Twenty-second street, nineteen (19) feet (5) inches; thence southerly, and on a line parallel to Ninth avenue aforesaid, and through the centre of the party wall between the house erected on the lot adjoining, and known as number 284 (two hundred and eighty-four) West Twenty-second street, and the house erected on the lot hereby conveyed, ninety-three (93) feet six (6) inches; thence easterly, and in a line parallel to Twenty-second street aforesaid, nineteen (19) feet (5) five inches; 3254 and thence northerly, and in a line parallel to Ninth avenue aforesaid, and through the centre of the party

wall between the house erected on the lot adjoining,
 and known as number 280 (two hundred and eighty)
 West Twenty-second street, and the house erected on
 the lot hereby conveyed, ninety-three (93) feet six (6)
 inches, to Twenty-second street, the point or place of
 beginning; said lot being nineteen (19) feet five (5)
 inches in width, front and rear, and ninety-three (93)
 feet six (6) inches in depth on each side. Together
 3255 with all and singular the tenements, hereditaments, and
 appurtenances thereunto belonging, or in any wise
 appertaining, and the reversion and reversions, remain-
 der and remainders, rents, issues, and profits thereof;
 and also all the estate, right, title, interest, property,
 possession, claim, and demand whatsoever, as well in
 law as in equity, of the said party of the first part, of,
 in, and to the same, and every part and parcel thereof,
 with the appurtenances: to have and to hold the above
 granted, bargained and described premises, with the
 appurtenances, unto the said parties of the second part,
 their heirs and assigns, to their own proper use, benefit,
 and behoof forever, subject to all the covenants con-
 3256 cerning the occupation of the said premises hereby
 granted, and the construction of buildings thereon, con-
 tained in the deed dated November 1st, 1834, made by
 Clement C. Moore to George Coghill, and recorded in
 the Register's office of the city of New York, in Liber
 318 of Cons., page 161, November 20, 1834, and the
 deed dated August 31, 1839, made by George Cog-
 gill to said Edwin Forrest, recorded in Liber 398 of
 Cons., page 471, August 31, 1839. And the said par-
 ties of the second part, for themselves, their and each of
 their legal representatives, do hereby covenant and
 agree, to and with the said party of the first part, that
 3257 they will keep and observe all and every the said cove-
 nants and agreements contained in said deeds. And the
 said Edwin Forrest, for himself, his heirs, executors and
 administrators, doth covenant, grant, and agree, to and

with the said parties of the second part, their heirs and assigns, that the said Edwin Forrest, at the time of the sealing and delivery of these presents, is lawfully seized, in his own right, of a good, absolute, and indefeasible estate of inheritance, in fee simple, of, and in all and singular the above granted and described premises, with the appurtenances, subject to the inchoate right 3258 of dower of Catharine N. Forrest, and hath good right, full power, and lawful authority, to grant, bargain, sell, and convey the same in manner aforesaid. And that the said parties of the second part, their heirs and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy, the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons lawfully claiming or to claim the same; and in particular, the said party of the first 3259 part doth, for himself, his heirs, executors and administrators, covenant, promise and agree, to and with the said parties of the second part, their heirs, executors, administrators, and assigns, well and truly to indemnify and save harmless the said parties of the second part, their heirs, executors, administrators or assigns, of and from the inchoate right of dower of Catharine N. Forrest, the wife of the said party of the first part, and all claims, demands, controversies, actions, damages, or sums of money to arise or to become payable by reason thereof; and that the same now are free, clear, discharged, and unencumbered of and from all former and other grants, 3260 titles, charges, estates, judgments, taxes, assessments, and encumbrances of what nature or kind soever, except as aforesaid. And also, that the said party of the first part, and his heirs, and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title, or interest, of, in, or to the hereinbefore

granted premises, by, from, under, or in trust for him or them, shall and will, at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said parties of the second

3261 part, their heirs and assigns, make, do, and execute, or cause to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted, or so intended to be, in and to the said parties of the second part, their heirs and assigns forever, as by the said parties of the second part, their heirs or assigns, or their counsel learned in the law, shall be reasonably advised or required. And the said Edwin Forrest, his heirs, the above described and hereby granted and released premises, and every part

3262 and parcel thereof, with the appurtenances, unto the said parties of the second part, their heirs and assigns, against the said party of the first part, and his heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

In witness whereof, the said parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

EDWIN FORREST, [L. s.]

Signed, sealed, and delivered in the presence of [the words "November 1, 1834," on 22d line, second page, and the words "George Coggill and," on 23d line, and the figures "318," on 24th line, and the words "161, November 20, 1834," on 25th line, written on erasure, and the words "and the deed dated August 31st, 1839, made by George Coggill to said Edwin Forrest, recorded in Liber 398 of Cons., page 471, August 31, 1839," interlined on 25th line before execution]

3263

J. WARREN LAWTON.

City and County of New York, ss. :

On the 15th day of March, 1856, before me personally came Edwin Forrest, known to me to be the individual described in and who executed the foregoing conveyance, and he acknowledged that he executed the same. 3264

SYLVESTER LAY,
Com'r of Deeds.

Recorded the preceding, at the request of C. J. & E. De Witt, March 15, 1856, at 3 o'clock and 50 minutes, P. M.

JOHN J. DOANE, *Reg.*

Register's Office, City and County of New York :

I have compared the preceding with an instrument in this office, recorded in Liber No. 705 of Conveyances, page 151, March 15th, 1856, at 3 o'clock and 50 minutes P. M., and certify the preceding to be a full and correct transcript of said record. I further certify 3265 that there is no official seal belonging to this office. Dated this 4th day of June, A. D. 1859.

THOS. C. ACTON, *Dep. Reg.*

Endorsed—"Edwin Forrest to Jane Cameron and Euphemia Cameron. Copy of Deed. Ex. No. 10. A. C. B."

Exhibit No. 11.

This Indenture, made the first day of March, in the year one thousand eight hundred and fifty-six, between Edwin Forrest, of the city of Philadelphia, State of Pennsylvania, party of the first part, and Philip F. Pistor, of the city of New York, party of the second 3266 part, witnesseth: That the said party of the first part, for and in consideration of the sum of eleven thousand five hundred dollars, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs, executors, and administrators, forever released and discharged

from the same, by these presents, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, 3267 sell, alien, remise, release, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever, all that certain lot, piece, or parcel of land, with the buildings thereon, situate, lying and being in the Sixteenth Ward of the city of New York, bounded and described as follows, to wit: beginning at a point on the southerly side of Twenty-second street, at a point distant three hundred and fifty feet westwardly from the Ninth avenue, thence running southerly, parallel with the Ninth avenue, passing through the centre of a party wall standing on the premises hereby conveyed, ninety-three feet six inches; thence easterly, parallel with 3268 Twenty-second street, thirty-three feet; thence northerly, parallel with Ninth avenue, and passing through the centre of another party wall separating the premises hereby conveyed from other lands now or late of said party of the first part, ninety-three feet six inches, to Twenty-second street; and thence westerly, along Twenty-second street, thirty-three feet to the point and place of beginning; together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also, all the estate, right, title, 3269 interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same, and every part and parcel thereof, with the appurtenances: to have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever. And the said Edwin Forrest, for himself, his heirs, executors, and administrators, doth covenant, grant, and agree, to and

with the said party of the second part, his heirs and 3270 assigns, that the said Edwin Forrest, at the time of the sealing and delivery of these presents, is lawfully seized, in his own right, of a good, absolute, and indefeasible estate of inheritance, in fee simple, of and in all and singular the above granted and described premises, with the appurtenances, and subject to the inchoate right of dower of Catharine N. Forrest, and hath good right, full power, and lawful authority, to grant, bargain, sell and convey the same, in manner aforesaid ; and that the said party of the second part, his heirs and assigns, shall and may, at all times hereafter, peaceably and quietly have, 3271 hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons lawfully claiming or to claim the same ; and that the same now are free, clear, discharged and unencumbered, of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumbrances, of what nature or kind soever. And in particular, the said party of the first part doth, for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said party of the 3272 second part, his heirs, executors, administrators and assigns, well and truly indemnify and save harmless the said party of the second part, his heirs, executors, administrators or assigns, of and from the inchoate right of dower of Catharine N. Forrest, the wife of the said party of the first part, and all claims, demands, controversies, damages, or sums of money to arise or become payable by reason thereof.

And also, that the said party of the first part; and his heirs, and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title, or interest, of, in, or to the hereinbefore granted premises, 3273

by, from, under, or in trust for him or them, shall and will, at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and assigns, make, do, and execute, or cause to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted, or so intended to be, in and to the said party of the second part, his heirs
 3274 and assigns, forever, as by the said party of the second part, his heirs or assigns, or his or their counsel, learned in the law, shall be reasonably advised or required; and the said , heirs, the above-described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, heirs and assigns, against the said party of the first part, and heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

And the said party of the second part, for himself, his
 3275 heirs and assigns, doth hereby covenant, to and with the said Edwin Forrest, his heirs, executors, and administrators, that neither the said party of the second part, nor his heirs or assigns, shall, or will, at any time hereafter, erect any buildings within forty feet of the front of said lot, except of brick or stone, with roofs of slate or metal, and will not erect, or permit, upon any part of the said lot, any slaughter-house, smith-shop, forge, furnace, steam engine, brass foundry, nail, or other iron factory, or any manufactory of gunpowder, glue, varnish, vitriol, ink, or turpentine, or for the tanning, dressing, or preparing skins, hides, or leather, or any brewery, distillery,
 3276 or any other noxious or dangerous trade or business.

In witness whereof, the parties to these presents

have hereunto interchangeably set their hands and seals, the day and year first above written.

EDWIN FORREST, [L. s.]

PH. F. PISTOR, [L. s.]

Sealed and delivered in the presence of }
 [the words from "subject" to "For- }
 rest," interlined on last line of 2d page, }
 and the words "aforesaid" and "the }
 said," on said interlineations on last }
 line of 2d page, erased before exe- }
 cution]

3277

GEO. GILFERT WATERS.

City and County of New York, ss.:

On the first day of March, A.D. 1856, before me came George G. Waters, subscribing witness to the foregoing deed, who is to me personally known, and being by me duly sworn, did depose and say, that he knew Edwin Forrest and Philip F. Pistor, the parties described in and who executed the foregoing indenture; that he saw them execute the same, and subscribed his name as a witness thereto; and further, the said witness resides in the city of New York.

E. FRANCIS COREY, JR., 3278

Comm'r of Deeds.

Recorded the preceding, at request of Waters & Cushman, March 1st, 1856, at 2 o'clock and 35 min., P. M.

JOHN J. DOANE,
Reg.

Register's Office, City and County of New York:

I have compared the preceding with an instrument in this office, recorded in Liber No. 698 of Conveyances, page 641, March 1st, 1856, at 2 o'clock and 35 minutes, P. M., and certify the preceding to be a full and correct transcript of said record. I further certify that there is 3279

no official seal belonging to this office. Dated this 4th day of June, A. D. 1859.

THOS. C. ACTON,

Dep. Reg.

Endorsed—"Edwin Forrest to Philip F. Pistor. Copy Deed. Ex. No. 11. A. C. B."

Exhibit No. 12.

This Indenture, made the eighth day of March, in the year one thousand eight hundred and fifty-six, between
 3280 Edwin Forrest, of the city of Philadelphia and State of Pennsylvania, party of the first part, and Thomas B. Coddington, of the city and State of New York, merchant, party of the second part: Witnesseth, That the said party of the first part, for and in consideration of the sum of eleven thousand six hundred dollars, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs, executors and administrators, forever released and discharged from the same, by these presents, hath granted, bargained, sold, aliened, remised, released,
 3281 conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever, All that certain brick dwelling house and lot, piece or parcel of land and premises, situate, lying and being in the Sixteenth Ward of the city of New York, on the southerly side of Twenty-second street, between Ninth and Tenth avenues, and known as number (284) two hundred and eighty-four West Twenty-second street, bounded and containing as follows: Beginning at a point on the southerly side of Twenty-second street, distant two hundred and seventy-
 3282 seven feet eight inches westerly from the south-westerly corner of Twenty-second street and Ninth avenue, and running thence westerly along Twenty-second street nineteen (19) feet five (5) inches; thence southerly, and

in a line parallel to Ninth avenue, and through the centre of the party wall between the house erected on the lot adjoining, and known as number (286) two hundred and eighty-six West Twenty-second street, and the house erected on the lot hereby conveyed, ninety-three (93) feet six (6) inches; thence easterly and in a line parallel with Twenty-second street, nineteen (19) feet five (5) inches, and thence northerly, and in a line parallel to 3283 Ninth avenue, and through the centre of the party wall between the house erected on the lot adjoining, and known as number (282) two hundred and eighty-two West Twenty-second street, and the house erected on the lot hereby conveyed, ninety-three (93) feet six (6) inches to Twenty-second street, aforesaid, the point or place of beginning, said lot being nineteen (19) feet (5) five inches in width, in front and rear, and ninety-three feet (93) six (6) inches in depth, on each side. Also, all that certain brick dwelling house and lot, piece or parcel of land and premises, situate, lying and being in 3284 the Sixteenth Ward of the city of New York, on the southerly side of Twenty-second street, between the Ninth and Tenth avenues, and known and distinguished as number (286) two hundred and eighty-six West Twenty-second street, bounded and containing as follows: Beginning at a point on the southerly side of Twenty-second street, distant two hundred and ninety-seven (297) feet one (1) inches westerly from the south-westerly corner of Twenty-second street and Ninth avenue, and running thence westerly along Twenty-second street, nineteen (19) feet eleven (11) inches; thence southerly, and in a line parallel to Ninth avenue, and 3285 through the centre of the party wall between the house erected on the lot adjoining, and known as number (288) two hundred and eighty-eight West Twenty-second street, and the house erected on the lot hereby conveyed, ninety-three (93) feet six (6) inches; thence easterly and in a line parallel to Twenty-second street, nineteen (19)

feet eleven (11) inches, and thence northerly and in a line parallel to Ninth avenue aforesaid, and through the centre of the party wall between the house erected on
 3286 the lot adjoining, and known as number (284) two hundred and eighty-four West Twenty-second street, and hereinbefore described, and the house erected on the lot hereby conveyed, ninety-three (93) feet six (6) inches to Twenty-second street aforesaid, the point or place of beginning, said lot being nineteen (19) feet eleven (11) inches in width, in front and rear, and ninety-three (93) feet six (6) inches in depth on each side. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and
 3287 remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof, forever; subject to all the covenants concerning the occupation of the said premises hereby granted, and the construction of buildings thereon, contained in the
 3288 deed dated November 1st, 1834, made by Clement C. Moore to George Coggill, and recorded in Register's Office of the city of New York, in Liber 318 of Cons., page 161, November 20th, 1834, and the deed dated August 31, 1839, made by George Coggill to said Edwin Forrest, recorded in Liber 398 of Cons., page 471, August 31st, 1839. And the said party of the second part, for himself and his legal representatives, do hereby covenant and agree, to and with the said party of the first part hereto, that he will keep and observe all and every the said covenants and agreements contained in

said deeds. And the said Edwin Forrest, for himself, his 3289
 heirs, executors and administrators, doth covenant, grant
 and agree, to and with the said party of the second part,
 his heirs and assigns, that the said Edwin Forrest, at the
 time of the sealing and delivery of these presents, is law-
 fully seized, in his own right, of a good, absolute and in-
 defeasible estate of inheritance, in fee simple, of, and in
 all and singular the above granted and described prem-
 ises, with the appurtenances, subject to the inchoate
 right of dower of Catharine N. Forrest, and hath good
 right, full power, and lawful authority, to grant, bar-
 gain, sell and convey the same, in manner aforesaid : and 3290
 that the said party of the second part, his heirs and as-
 signs, shall and may, at all times hereafter, peaceably
 and quietly have, hold, use, occupy, possess and enjoy
 the above granted premises, and every part and parcel
 thereof, with the appurtenances, without any let, suit,
 trouble, molestation, eviction or disturbance of the said
 party of the first part, his heirs or assigns, or of any
 other person or persons lawfully claiming or to claim the
 same : And that the same now are free, clear, discharg-
 ed and unencumbered, of and from all former and other
 grants, titles, charges, estates, judgments, taxes, assess-
 ments and encumbrances, of what nature or kind soever, 3291
 except as aforesaid, and in particular, the said party of
 the first part doth, for himself, his heirs, executors and
 administrators, covenant, promise and agree, to and
 with the said party of the second part, his heirs, execu-
 tors, administrators and assigns, well and truly to indem-
 nify and save harmless the said party of the second part,
 his heirs, executors, administrators and assigns, of and
 from the inchoate right of dower of Catharine N.
 Forrest, the wife of the said party of the first
 part, and all claims, demands, controversies, actions,
 damages, or sums of money, to arise or become pay-
 able by reason thereof, or by reason of any mari- 3292
 tal rights of the said Catharine N. Forrest, and

also, that the said party of the first part, and his heirs, and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title or interest, of, in or to the hereinbefore granted premises, by, from, under, or in trust for him or them, shall and will, at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and assigns, make, do and execute, or cause to be made, done
 3293 and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted or so intended to be, in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns, or his or their counsel learned in the law, shall be reasonably advised or required ; and the said Edwin Forrest, his heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said part of the second part, heirs and as-
 3294 signs, against the said part of the first part, and heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

In witness whereof, the said parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

EDWIN FORREST, [L. s.]

Sealed and delivered in the pre-
 sence of [the words "or by
 reason of any marital rights
 of the said Catharine N. For-
 rest," on the 18th line, page
 3d, interlined before execu-
 tion]

J. WARREN LAWTON.

City and County of New York, ss.:

On the 15th day of March, A. D. 1856, before me personally came Edwin Forrest, known to me to be the individual described in and who executed the foregoing conveyance, and he acknowledged that he executed the same.

SYLVESTER LAY,
Comr. of Deeds. 3296

Recorded the preceding at the request of Speir & Nash, March 17th, 1856, at 9 o'clock, A. M.

JOHN J. DOANE, *Reg.*

Register's Office, City and County of New York:

I have compared the preceding with an instrument in this office, Recorded in Liber No. 701 of Conveyances, page 415, March, 17th, 1856, at 9 o'clock, A. M., and certify the preceding to be a full and correct transcript of said record. I further certify that there is no official seal belonging to this office. Dated this 3d day of June, A. D. 1859.

THOS. C. ACTON, 3297
Dep. Reg.

Endorsed—"Edwin Forrest to T. B. Coddington.
Ex. No. 12. A. C. B."

Exhibit No. 13.

NEW YORK, June 29th, 1859.

The subscriber having been required to examine the premises Nos. 282, 284, 286 and 288 West Twenty-second street, and Nos. 271, 273, 275 and 277 West Twenty-first street, and to ascertain the values thereof at any time during the year 1856, and also the value of 3298 rents of said premises during the years 1850 to 1857, both inclusive, makes the following report, viz.:

VALUE OF HOUSES IN THE YEAR 1856.

| PARCEL. | PROPERTY. | VALUE. |
|--------------------------|--|-------------|
| | 1. House No. 284 West 22d street..... | \$5,550 00 |
| | 2. House No. 286 West 22d street..... | 6,050 00 |
| | 3. House No. 273 West 21st street..... | 6,600 00 |
| | 4. Two lots Nos. 275 & 277 West 21st st. | 7,500 00 |
| | 5. House No. 288 West 22d street..... | 11,500 00 |
| 3299 | 6. House No. 271 West 21st street.... | 6,750 00 |
| | 7. House No. 282 West 22d street..... | 5,500 00 |
| Total value in 1856..... | | \$49,450 00 |

RENTS.

| HOUSES. | 1850. | 1851. | 1852. | 1853. | 1854. | 1855. | 1856. | 1857. |
|--------------------|-------|-------|-------|-------|-------|-------|-------|-------|
| 1. 284 W. 22d st. | \$500 | \$500 | \$500 | \$550 | \$500 | \$600 | \$600 | \$650 |
| 2. 286 W. 22d st. | 525 | 525 | 525 | 600 | 650 | 650 | 650 | 700 |
| 3. 273 W. 21st st. | 575 | 575 | 575 | 625 | 625 | 675 | 675 | 750 |
| 4. 275, 277 W. 21 | | | | | | | | |
| 5. 288 W. 22d st. | 750 | 750 | 750 | 800 | 800 | 850 | 850 | 900 |
| 6. 271 W. 21st st. | 600 | 600 | 600 | 650 | 650 | 650 | 650 | 700 |
| 7. 282 W. 22d st. | 500 | 500 | 500 | 550 | 550 | 600 | 600 | 650 |

New York, June 29th, 1859.

THEO. B. BLEECKER.

Exhibit 14.

3300 MEMORANDUM OF PROCEEDINGS IN THIS ACTION.

1850, Nov. 19. Action commenced.

1850, Dec. 24. On plaintiff's motion, an order was made at Special Term for issues, Mr. O'Connor being heard for the plaintiff, Mr. Van Buren being heard for the defendant.

1851, May 27. George Roberts examined in Boston on commission issued by plaintiff.

1851, June 2. On defendant's motion, a special commission was obtained at Special Term to examine Ann Flowers, in New Orleans, with a stay of proceedings. This motion was opposed and argued by same counsel.

3301

- 1851, June 13. Plaintiff's motion for struck jury by same counsel.
- 1851, Aug. 26. *Samuel S. Smith* was examined conditionally for defendant, and cross-examined by plaintiff's said counsel.
- Aug. 30. *John Green* in like manner examined and cross-examined.
- 1851, Nov. 21. *John W. Foruey* examined in Philadelphia on commission issued by plaintiff. 3302
- 1851, Dec. 31. } *John Hawkes* and *Laura L. Hawkes* in
 1852, Jan. 1. } like manner examined as witnesses,
de bene esse, for the plaintiff and cross-examined.
- 1851, Dec. 15. Trial of cause commenced before Chief Justice Oakley and a jury, and trial continued from that time until the verdict was rendered, on January 26, 1852. There were upwards of eighty witnesses examined on the trial.
- 1852, Jan. 31. After discussions on several days, before the Chief Justice, judgment settled and entered this day. 3303
- Bill of exceptions made and settled, exceeding 1,800 folios.
- 1856, January. Plaintiff having appealed from part of the judgment, and the defendant having appealed from the whole of it, argument of said appeal was had by said counsel, before the General Term, occupying several days. The part of the judgment appealed from by the plaintiff was reversed. So much of the judgment as related to alimony 3304 was reversed on the defendant's appeal. The residue was affirmed. The order of the General Term was entered July 24, 1856.

A commission was issued, on the part of the plaintiff, for the examination of William A. Howard, and returned with a deposition, which was offered on the trial, objected to and not read.

3305 Another commission was issued, on the part of the plaintiff, to examine another witness, in Connecticut, and deposition returned, which was offered on the trial, objected to and not read.

The defendant examined, conditionally, another witness, who was cross-examined, at considerable length, by the plaintiff's counsel. No use was made of his deposition.

Exhibit 15.

| | |
|---|---------|
| Retainer..... | \$500 |
| Preparing pleadings..... | 250 |
| Motion for issues..... | 100 |
| 3306 Commission to Boston..... | 100 |
| Ann Flowers, special commission..... | 100 |
| Motion for struck jury..... | 100 |
| Examination of S. S. Smith..... | 50 |
| John Green's do..... | 100 |
| John and Laura Hawks..... | 100 |
| Counsel, for preparing for trial..... | 500 |
| Trying cause..... | 3,000 |
| Arguing or settling judgment on verdict of jury..... | 250 |
| Amending and settling bill of exceptions..... | 250 |
| Argument of appeal at General Term..... | 1,000 |
| Other counsel fees on commissions and depositions de bene esse..... | 250 |
| General counsel fees during about — years, in | |
| 3307 matters not enumerated..... | 1,000 |
| | <hr/> |
| | \$7,000 |
| | <hr/> |

Exhibit No. 16.

This Indenture, made the eighth day of March, in the year one thousand eight hundred and fifty-six, between Thomas B. Coddington, of the city and State of New

York, merchant, party of the first part, and Edwin Forrest, of the city of Philadelphia and State of Pennsylvania, party of the second part. Whereas the premises hereinafter described have been conveyed by the said party of the second part to the said Thomas B. Coddington, by deed bearing even date herewith, and containing the usual full covenants, and in particular, a covenant against the right of dower of Catharine N. Forrest, the wife of said Edwin Forrest, a release or discharge of which cannot now be obtained; and it has been agreed that part of the purchase money should be left on mortgage, as a further guarantee or security against any claim of the said Catharine N. Forrest; and whereas, in pursuance of such agreement, the said Thomas B. Coddington has this day executed and delivered, to said party of the second part, his bond, of even date with these presents, in the penal sum of seven thousand two hundred (7,200) conditioned for the payment to said Edwin Forrest, his executors, administrators, and assigns, of the sum of three thousand six hundred (3,600) dollars, on or before the expiration of five years, from the first day of May, eighteen hundred and fifty-six, with interest, at the rate of seven per centum per annum, payable semi-annually, from and to commence on the first day of May, eighteen hundred and fifty-six, with a proviso, that if the interest is regularly paid as aforesaid, that the said principal sum of three thousand six hundred (3,600) dollars shall not become and be due and payable until six months after the release, discharge, or extinction of the right of dower, or other marital rights of said Catharine N. Forrest, whether the same take place before or after the expiration of the said five years; which said bond also contains an agreement, that, should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is made payable, as above expressed, and should the same remain unpaid

and in arrear for the space of thirty (30) days, then and from thenceforth, that is to say, after the lapse of the said thirty (30) days, the aforesaid principal sum of three thousand six hundred dollars, with all arrearage
 3311 of interest thereon, shall, at the option of the said party of the second part, or his legal representative, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, any thing therein before contained, to the contrary thereof, in any wise notwithstanding, as by the said bond or obligation, and the condition thereof, and the said agreement therein contained, reference being thereunto had, may more fully appear. Now, this Indenture witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the con-
 3312 dition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all that certain brick dwelling-house, and lot, piece or parcel of land and premises,
 3313 situate, lying and being in the Sixteenth Ward of the city of New York, on the southerly side of Twenty-second street, between Ninth and Tenth avenues, and known as number 284 (two hundred and eighty-four) West Twenty-second street, bounded and containing as follows: beginning at a point on the southerly side of Twenty-second street, distant two hundred and seventy-seven (277) feet eight (8) inches westerly from the south-westerly corner of Twenty-second street and

Ninth avenue, and running thence westerly along Twenty-second street, nineteen (19) feet five (5) inches; thence southerly, and in a line parallel to Ninth avenue, 3314 and through the centre of the party wall between the house erected on the lot adjoining, and known as number 286 (two hundred and eighty-six) West Twenty-second street, and the house erected on the lot hereby conveyed, ninety-three (93) feet six (6) inches; thence easterly and in a line parallel to Twenty-second street, nineteen (19) feet five (5) inches, and thence northerly, and in a line parallel to Ninth avenue, and through the centre of the party wall between the house erected on the lot adjoining, and known as number two hundred and eighty-two (282) West Twenty-second street, and the house erected on the lot hereby 3315 conveyed, ninety-three (93) feet six (6) inches, to Twenty-second street aforesaid, the point or place of beginning, said lot being nineteen (19) feet five (5) inches in width in front and rear, and ninety-three (93) feet six (6) inches in depth on each side; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also, all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same, 3316 and every part and parcel thereof, with the appurtenances: to have and to hold the above granted and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever. Provided always, and these presents are upon this express condition, that if the said party of the first part, his heirs, executors, or administrators, shall well and truly pay unto the said party of the second part, his executors, administrators, or assigns, the said sum of

3317 money mentioned in the condition of the said bond or obligation and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine, and be void. And the said Thomas B. Coddington, for himself, his heirs, executors, and administrators, doth covenant and agree to pay unto the said party of the second part, his executors, administrators, or assigns, the said sum of money and interest, as mentioned above, and expressed in the con-

3318 dition of the said bond. And if default shall be made in the payment of the said sum of money above mentioned, or the interest that may grow due thereon, or of any part thereof, that then and from thenceforth it shall be lawful for the said party of the second part, his executors, administrators and assigns, to enter into and upon all and singular the premises hereby granted or intended so to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said party of the first part, his heirs, executors, administrators or assigns, therein, at public auction, according to the act in such case made and provided: And as

3319 the attorney of the said party of the first part, for that purpose by these presents duly authorized, constituted and appointed, to make and deliver, to the purchaser or purchasers thereof, a good and sufficient deed or deeds of conveyance in the law for the same, in fee simple, and, out of the money arising from such sale, to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the said premises, rendering the overplus of the purchase money. (if any there shall be) unto the said Thomas B. Coddington, party of the first part, his heirs, executors, administrators or assigns; which sale, so to be made, shall forever

3320 be a perpetual bar, both in law and equity, against the

said party of the first part, his heirs and assigns, and all other persons claiming or to claim the premises or any part thereof, by, from, or under him or them, or either of them.

And the said Thomas B. Coddington further covenants, for himself, his heirs and assigns, that he and they will, during all the time until the said money secured by these presents shall be fully paid and satisfied, keep the building, erected on the said lot of land, insured, in and by some incorporated company of good standing, against loss or damage by fire, in at least the sum of three 3321 thousand six hundred (3,600) dollars, and will assign the policy and policies of such insurance to the said party of the second part, or his legal representatives, so and in such manner and form that he and they shall at all time and times, until the full payment of the said moneys, have and hold the said policy or policies, as a collateral and further security for the payment thereof. And in default of so doing, that the said party of the second part, or his legal representatives, may make such insurance, from year to year, in a sum not exceeding three thousand six hundred (3,600) dollars, for the purposes aforesaid, and pay the premium and premiums 3322 therefor, which premium and premiums thus paid, and the interest thereon from the time of payment, the said Thomas B. Coddington doth covenant, as aforesaid, to pay to the said party of the second part, or his legal representatives, on demand, and that the same shall be deemed to be secured by these presents, and shall be collectable thereupon and thereby, in like manner as the said moneys mentioned in the said bond or obligation.

In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals, the 3323 day and year first above written.

T. B. CODDINGTON, [L. s.]

Sealed and delivered in the }
presence of }

JAS. HILLYER.

City and County of New York, ss. :

On the fourteenth day of March, one thousand eight hundred and fifty-six, before me personally came Thomas B. Coddington, known to me to be the person 3324 described in and who executed the within instrument, and acknowledged he executed the same.

JAS. HILLYER,
Com. of Deeds.

Recorded by the request of Edwin Forrest, March 17, 1860, at 40 minutes past 9, A. M.

JOHN J. DOANE, *Reg.*

Register's Office, City and County of New York:

I have compared the preceding with an instrument in this office, recorded in Liber 509 of Mortgages, page 172, March 17, 1856, at 40 minutes past 9 o'clock, A. M., 3325 and certify the preceding to be a full and correct transcript of said record. I further certify that there is no official seal belonging to this office. Dated this 3d day of June, A. D. 1859.

THOS. C. ACTON, *Dep. Reg.*

Endorsed—"Thomas B. Coddington to Edwin Forrest. Shown to Edwin Forrest, July 28, 1859, on his cross-examination.—A. C. Bradley, *Referee*."

"Forrest *vs.* Forrest. Ex. No. 16.—A. C. Bradley, *Referee*."

Exhibit No. 17.

State of Pennsylvania, City and County of Philadelphia :

3326

Pleas at Philadelphia, before the Honorable George Sharswood, President, George M. Stroud and J. G. Clarke Hare, Esquires, Judges of the District Court for the city and county of Philadelphia, of September Term, 1855.

Docket entries September Term, 1855, No. 1192.

[L. s.]

WILLIAM GAUL
 vs.
 EDWIN FORREST.

D. C., Sept.
 Term, 1855,
 No. 1192.

Sci. fa. sur. mortgage (Recorded in M. B. R. D. W., 3327
 No. 14, 401), Ex. Oct. 22, Ret. 1 Mon. Nov.

"Made known."

Nov. 10, 1855. By or. of plaintiff's attorney, filed
 judgment entered by default of an appearance.

Nov. 14, 1855, damages assessed at \$6,091.

Sci. facs. D., 55, 102.

And now, Oct. 22, 1855, a precept of the common-
 wealth of Pennsylvania, commonly called a sci. fa. sur.
 mortgage, is issued out of the District Court for the
 city and county of Philadelphia, which, with the sher-
 iff's return and endorsement thereon, is in the words
 following, to wit:

3328

*The Commonwealth of Pennsylvania—To the Sheriff of
 Philadelphia County, greeting:*

Whereas, by a certain indenture, made the twelfth day
 of July, in the year of our Lord one thousand eight hun-
 dred and fifty-five (1855), between Edwin Forrest, of
 the city of Philadelphia, gentleman, of the one part,
 and William Gaul, of the said city of Philadelphia,
 merchant, of the other part (recorded in the office for
 recording deeds, &c., for the city and county of Philadel-
 phia, in Mortgage Book R. D. W., No. 14, page 401, &c.,
 on the 20th day of July, A. D. 1855), reciting, that 3329
 whereas the said Edwin Forrest, in and by a certain
 obligation or writing obligatory, under his hand and
 seal, duly executed, bearing even date therewith, stands
 bound unto the said William Gaul in the sum of twelve
 thousand dollars, lawful money of the United States of
 America, conditioned for the payment of six thousand
 dollars lawful money aforesaid, in three months from
 the date thereof, together with lawful interest for the
 same, in like manner.

Provided, however, and it shall and may be lawful for
 3330 the said mortgagee or his legal representatives, immediately upon the expiration of the said three months, to sue out forthwith a writ of *scire facias* upon the present Indenture of Mortgage, and collect the same as although a year and a day had fully expired, any law to the contrary thereof notwithstanding; and the said Edwin Forrest, as well for and in consideration of the aforesaid debt or sum of six thousand dollars, and for the better securing the payment thereof, with its interests, unto the said William Gaul, his executors, administrators, and assigns, in discharge of the said recited obligation, as for and in consideration of the further sum of one dollar, unto
 3331 him in hand well and truly paid by the said William Gaul, the receipt whereof is thereby acknowledged, did grant, bargain, sell, release, and confirm unto the said William Gaul, his heirs and assigns, all that certain messuage or tenement and lot or piece of ground thereunto belonging, situate on the west side of Delaware Tenth street, at the distance of one hundred and ten feet six inches, southward, from Vine street, in the city of Philadelphia, containing in front, or breadth, on the said Tenth street, eighteen feet five inches, and in length or depth, westward, eighty-nine feet; bounded north-
 3332 ward by ground now or late of Isaac Harbert; westward, by a ten-feet wide alley, leading into Vine street; southward, by ground now or late of Anna L. Baker; and eastwardly by Tenth street, aforesaid (being the same premises which Abraham Ritter, by Indenture dated the seventh day of September, 1827, recorded in Deed Book G. W. R., No. 16, page 781, did grant and convey unto said Edwin Forrest in fee, and the said Edwin Forrest and Rebecca, his wife, by Indenture, dated the nineteenth day of June, 1838, and intended to be recorded, did grant and assign said premises unto
 3333 Rebecca Forrest, widow, and her assigns, for and during all the term of her natural life, and the said Rebecca

Forrest hath since departed this life, whereupon the said estate ceased), together with the free and common use, right, liberty, and privilege of the said ten-feet wide alley, and together with the appurtenances, to have and to hold the same unto the said William Gaul, his heirs and assigns, to and their only proper use and behoof forever; and in and by the said indenture it was provided always, nevertheless, that if the said Edwin Forrest, his heirs, executors, administrators, or assigns, 3334 should and did well and truly pay, or cause to be paid, unto the said William Gaul, his executors, administrators, or assigns, the aforesaid debt or sum of six thousand dollars, on the day and time therein being mentioned and appointed for payment thereof, together with the lawful interest thereof, without any fraud or further delay, and without any deduction, defalcation or abatement to be made of any thing for or in respect of any taxes, charges, or assessments whatsoever, then and from thenceforth, as well the said indenture and the estate thereby granted, as the said recited obligation, should cease, determine, and become 3335 void, any thing therein contained to the contrary in any wise notwithstanding. And whereas, the said sum of six thousand dollars, with the interest thereof, as yet remains unpaid, as we have been given to understand, and the said William Gaul, praying that a fit remedy in this behalf may be provided, We command you that, by good and lawful men of your bailiwick, you make known to the said Edwin Forrest that he be and appear before our Judges, at Philadelphia, at our District Court for the city and county of Philadelphia, there to be held the first Monday of November next, to show, if 3336 any thing he knows, or has to say, why the said mortgaged premises, with the appurtenances, ought not to be taken in execution, and sold, to satisfy the debt and interest aforesaid, if to him it shall seem expedient.

And have you then there the names of those by

whom you shall so make it known to him and this writ.

Witness, the Honorable George Sharswood, Doctor of Laws, President of our said Court, at Philadelphia, the 22d day of October, in the year of our Lord one thousand eight hundred and fifty-five.

3337

EDWIN F. CHASE, JR.,
Prothonotary.

Made known by leaving a true and attested copy of within writ at the dwelling-house of the defendant, October 24th, 1855, with an adult member of his family.

So answers

F. P. MAGEE,
Dep. Sheriff.
GEO. MAGEE, *Sheriff.*

1192, Sept., 1855.

| | |
|----------------------------------|---|
| WM. GAUL
v.
EDWIN FORREST. | } |
|----------------------------------|---|

Sci. fa. sur. mortgage.

3338

BLADEN.

And now, November 10, 1855, order for judgment filed in the words following, to wit:

| | | |
|-----------------------------------|---|---|
| WM. GAUL
vs.
EDWIN FORREST. | } | <i>D. C.</i>
<i>S. 55.</i>
<i>No. 1192.</i> |
|-----------------------------------|---|---|

Sci. fa. sur. mortg., &c.

Enter judgment against defendant in above case for want of an appearance. Prothy. to assess damages, &c.

WASH. L. BLADEN,
Att'y for Plff.

J. W. FLETCHER, Esq.,

3339

Pro. D. C.

And November 14, 1855, assessment of damages filed
in the words following, to wit :

| | | | |
|---|---------|----|------------------------------|
| <div style="border-top: 1px solid black; border-bottom: 1px solid black; padding: 5px; display: inline-block;"> WILLIAM GAUL
 <i>vs.</i>
 EDWIN FORREST. </div> | | } | D. C.
S. 55.
No. 1192. |
| 1855. Oct. 12. To amount of mortgage | \$6,000 | 00 | |
| Nov. 10. To interest from July 12th, to
date | | 91 | 00 |
| | | | \$6,091 00 |

Assess damages as above, a six thousand and ninety- 3340
one dollars.

WASH. L. BLADEN,
Att'y for Plff.

To J. W. FLETCHER, Esq.,
Pro. D. C.

I assess damages as above.

E. F. CHASE,
Proth'y.

Whereupon it is considered by the said Court that the
said plaintiff do recover of the said defendant the sum of
six thousand and ninety-one dollars ; also, the further
sum of ten dollars and seventy-five cents for his costs
and charges, by him about his suit in that behalf ex-
pended, whereof the said defendant is convict, as appears 3341
of record ; and the said defendant, in mercy, &c.

In the District Court for the city and county of Phil-
adelphia.

Ex. Docket Entries.

December Term, 1855, No. 102.

| | | | |
|---|--|---|---|
| <div style="border-top: 1px solid black; border-bottom: 1px solid black; padding: 5px; display: inline-block;"> WILLIAM GAUL
 <i>vs.</i>
 EDWIN FORREST. </div> | | } | D. C.
<i>Ex. Dec., 1855,</i>
No. 102. |
| Bladen, 102. | | | |
| Sci. fa. (S. 55, 1192.) | | | |

| | |
|-----------------------------|------------|
| Real debt..... | \$6,091 00 |
| Int. fr. Nov. 10, '55 | |
| Atty. writ and ser..... | 5 75 |
| 3342 C..... | 12 |
| Proth..... | 4 75 |
| Sat..... | 12 |
| Ser..... | 75 |

Sold to Albert L. Bonaffen for \$6,050 00.

And now Nov. 15, 1855, a precept of the Commonwealth of Pennsylvania, commonly called a sci. fa., is issued out of the District Court for the city and county of Philadelphia, which, with the sheriff's return and endorsement thereon, is in the words following, to wit:

The Commonwealth of Pennsylvania—To the Sheriff of Philadelphia County, greeting:

We command you, that without any other writ from us, of the lands and tenements, which were of Edwin
 3343 Forrest, to wit: all that certain messuage or tenement and lot or piece of ground thereunto belonging, situate on the west side of Delaware Tenth street, at the distance of one hundred and ten feet six inches southward from Vine street, in the city of Philadelphia, containing, in front or breadth in the said Tenth street, eighteen feet five inches, and in length or depth, westward, eighty-nine feet, bounded northward by ground now or late of Isaac Harbert, westward by a ten-feet wide alley, leading into Vine street, southward by ground now or late of Anna L. Baker, and eastwardly by Tenth street
 3344 aforesaid (being the same premises which Abraham Ritter by indenture, dated the seventh day of September, 1827, recorded in Deed Book G. W. R., No. 16, page 781, did grant and convey unto said Edwin Forrest, in fee, and the said Edwin Forrest and Rebecca, his wife, by indenture dated the nineteenth day of June, 1838, and intended to be recorded, did grant and assign said premises unto Rebecca Forrest, widow, and her assigns, for and during all the time of natural life, and the said

Rebecca Forrest hath since departed this life, whereupon the said estate ceased), together with the free and common use, right, liberty, and privileges of the said ten- 3345 feet wide alley, together with the hereditaments and appurtenances, in your bailiwick, you cause to be levied, as well a certain debt of six thousand and ninety-one dollars cents, lawful money of Pennsylvania, with the lawful interest thereof, from the tenth day of November, in the year of our Lord one thousand eight hundred and fifty-five, as also ten dollars seventy-five cents, like lawful money, for costs, which said debt, with interest and costs aforesaid, William Gaul, lately in our District Court for the city and county of Philadelphia, before our judges of Philadelphia, to wit: on the tenth day of November, in the year of our Lord one 3346 thousand eight hundred and fifty-five, by the consideration of the same Court, recovered, to be levied of the same premises, with the appurtenances, by the default of the said Edwin Forrest in not paying the said sum of six thousand and ninety-one dollars cents, with the lawful interest thereof, at the day and time when the same ought to have been paid, according to the form and effect of an act of Assembly of the State of Pennsylvania, in such case made and provided. And have you those moneys before our judges at Philadelphia, at our District Court for the city and county of Philadelphia, there to be held on the first Monday of December next, to render unto the said plaintiff for the debt, interest 3347 and damages aforesaid, whereof the said defendant is convicted, as appears of record, &c., and have you then and there this writ.

Witness the Honorable George Sharswood, Doctor of Laws, President of our said Court at Philadelphia, the fifteenth day of November, in the year of our Lord one thousand eight hundred and fifty-five.

EDWIN H. CHASE,
Pro Prothonotary.

To the Honorable the Judges within named :

I do certify, that in obedience to the within writ, after having given due and legal notice of the time and place of sale, I did on Monday, the third day of December, A. D. 1855, at the Sansom Street Hall, in the city of Philadelphia, expose the premises within described to sale, by public vendue, and sold the same to Albert L. Bonaffon for the price or sum of six thousand and fifty dollars, he being the highest, and that the highest and best price bidden for the same, which money, before the Judges within named, I have read as within I am commanded.

So answers

GEORGE MEGEE,

Sheriff.

Endorsed—" 102. Decem., 1855. William Gaul vs. Edwin Forrest. Sci. facs.

| | |
|-----------------------------|------------|
| 3349 Real debt..... | \$6,091 00 |
| Int. from Nov. 10, '55..... | |
| Atty. writ and ser..... | 5 75 |
| C..... | 12 |
| Proth'y..... | 4 75 |
| Ser..... | 75 |

Bladen (S. 55, 1192.)"

The Commonwealth of Pennsylvania—City and County of Philadelphia, ss. :

I, John P. McFadden, Prothonotary of the District Court for the city and county of Philadelphia, do certify that the foregoing is a true copy of the whole record in the case there stated.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, the first day of August, eighteen hundred and fifty-nine.

J. P. McFADDEN,

Prothonotary.

City and County of Philadelphia, ss. :

I, George Sharswood, President of the District Court for the city and county of Philadelphia, do certify that the foregoing record and attestation, made by John P. 3351 McFadden, Prothonotary of said Court, whose name is thereto subscribed, and seal of office affixed, are in due form and made by the proper officer.

In testimony whereof, I have hereunto set my hand, the first day of August, eighteen hundred and fifty-nine.

GEO. SHARSWOOD.

City and County of Philadelphia, ss. :

I, John P. McFadden, Prothonotary of the District Court for the city and county of Philadelphia, do certify that the Hon. George Sharswood, by whom the foregoing attestation was made, and whose name is thereto 3352 subscribed, was at the time of making thereof, and still is, President Judge of the District Court for the city and county of Philadelphia, duly commissioned and sworn, to all whose acts, as such, full faith and credit are and ought to be given, as well in courts of justice as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, the first day of August, eighteen hundred and fifty-nine.

[L. s.]

J. P. McFADDEN,

Prothonotary.

Endorsed—"Forrest vs. Forrest. Ex. No. 17. A. 3353 C. Bradley, Ref."

Exhibit No. 18.

This Indenture, made the twelfth day of July, in the year of our Lord one thousand eight hundred and fifty-five, between Edwin Forrest, of the city of Philadelphia, gentleman, of the one part, and William Gaul, of the said city of Philadelphia, merchant, of the other part. Whereas, the said Edwin Forrest, in and by a certain obligation or writing obligatory, under his hand and

seal duly executed, bearing even date herewith, standeth bound unto the said William Gaul in the sum of twelve thousand dollars, lawful money of the United
 3354 States of America, conditioned for the payment of the just sum of six thousand dollars lawful money, aforesaid, in three months from the date thereof, together with lawful interest for the same in like money, provided, however, and it shall and may be lawful for the said mortgagee or his legal representatives, immediately upon the expiration of the said three months, to sue out forthwith a writ of *scire facias* upon this present Indenture of Mortgage, and collect the same as though a year and a day had fully expired, any law to the contrary thereof notwithstanding, without any fraud or further delay, as in and by the said above recited obligation and
 3355 the condition thereof, relation being thereunto had, may more fully and at large appear.

Now, this Indenture witnesseth, that the said Edwin Forrest, as well for and in consideration of the aforesaid debt or principal sum of six thousand dollars as above said, and for the better securing the payment of the same, with interest, unto the said William Gaul, his executors, administrators, and assigns, in discharge of the said above recited obligation, as for and in consideration of the further sum of one dollar unto him in hand well and truly paid by the said William Gaul, at
 3356 and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released, and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release, and confirm unto the said William Gaul, his heirs and assigns, all that certain messuage or tenement and lot or piece of ground thereunto belonging, situate on the West side of Delaware Tenth street, at the distance of one hundred and ten feet six inches southward from Vine street, in the city of Philadelphia, containing in front or breadth, on the said Tenth street,

eighteen feet five inches, and in length or depth, westward, eighty-nine feet : bounded, northward, by ground now or late of Isaac Harbert ; westward, by a ten-feet 3357
 wide alley, leading into Vine street ; southward, by ground now or late of Anna L. Baker ; and eastward, by Tenth street, aforesaid (being the same premises which Abraham Ritter, by Indenture, dated the seventh day of September, 1827, recorded in Deed Book G. W. R., No. 16, page 781, did grant and convey unto the said Edwin Forrest, and the said Edwin Forrest and Rebecca, his wife, by Indenture, dated the nineteenth day of June, 1838, and intended to be recorded, did grant and assign said premises unto Rebecca Forrest, widow, and her assigns for and during all *her* term of her natural life, and the said Rebecca Forrest hath since depart- 3358
 ed this life, whereupon the said estate ceased), together with the free and common use, right, liberty and privilege of the said ten-feet wide alley, and together with all and singular the buildings, streets, alleys, ways, waters, water-courses, rights, liberties, privileges, improvements, hereditaments and appurtenances whatsoever thereunto belonging, or in any wise appertaining ; and the reversions and remainders, rents, issues and profits thereof. To have and to hold the said messuage or tenement and lot or piece of ground above described, hereditaments and premises, hereby granted or mentioned, and intended so to be, with the appurte- 3359
 nances, unto the said William Gaul, his heirs and assigns, to and for the only proper use and behoof of the said William Gaul, his heirs and assigns, forever. Provided always, nevertheless, that if the said Edwin Forrest, his heirs, executors, administrators, or assigns do and shall well and truly pay, or cause to be paid, unto the said William Gaul, his executors, administrators or assigns, the aforesaid debt or principal sum of six thousand dollars lawful money as above said, on the day and time hereinbefore mentioned and

3360 appointed for payment of the same, together with the lawful interest as aforesaid, without any fraud or further delay, and without any deduction, defalcation, or abatement to be made of any thing for or in respect of any taxes, charges, or assessments whatsoever, that then and from thenceforth, as well as this present indenture and the estate hereby granted, as the said above recited obligation, shall cease, determine and become void, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding. In witness whereof, the said parties to these presents have interchangeably set their hands and seals.

Dated the day and year first above written.

3361

EDWIN FORREST, [L. s.]

Sealed and delivered in the }
presence of us, }

JNO. B. KENNEY,

DAVID WEATHERBY, JR.

On the twelfth day of July, Anno Domini 1855, before the subscriber, an Alderman in and for the city of Philadelphia, personally appeared the above named Edwin Forrest, and in due form of law acknowledged the above indenture of mortgage to be his act and deed, and desired the same might be recorded.

Witness my hand and seal, the day and year aforesaid.

JNO. B. KENNEY, [L. s.]

Alderman.

Recorded July 20, 1855 (10½ A. M.)

This 14th day of January, 1856, appeared William Gaul, the mortgagee, and acknowledged full satisfaction of this mortgage.

WILLIAM GAUL.

Before me.

R. D. WILKINSON,

Recd'r.

City of Philadelphia, ss. :

I, Albert D. Boileau, Recorder of Deeds, &c., in and for the city and county of Philadelphia, do hereby certify that the above and foregoing is a true and correct copy of a certain instrument in writing, found of record in my office, in Mortgage Book R. D. W., No. 14, page 401, &c.

Witness my hand and seal of office, this
[L. s.] first day of August, Anno Domini
1859.

A. D. B.

City and County of Philadelphia, ss. :

I, Oswald Thompson, President Judge of the Court of Common Pleas for the county of Philadelphia, do certify, that the foregoing record and attestation made by Albert D. Boileau, Esquire, Recorder of Deeds, &c., in and for the said city and county, and whose name is thereto subscribed and seal of office affixed, are in due form, and made by the proper officer.

In testimony whereof I have hereunto set my hand the 1st day of August, A. D. 1859.

Endorsed—"Exemplification mortgage :

| | | | |
|---------------|-----------|---------------------------|----|
| Edwin Forrest | } Forrest | { Ex. No. 18. | |
| to | | | v. |
| William Gaul. | | | |
| | Forrest. | { A. C. BRADLEY,
Ref." | |

Exhibit No. 19.

Sisters of Charity of St. V't de Paul to Edwin Forrest :

This Indenture, made the twentieth day of December, in the year of our Lord one thousand eight hundred and fifty-six, between the Sisters of Charity of Saint Vincent de Paul, a benevolent and charitable incorporated society, parties of the first part, and Edwin Forrest, of the city of Philadelphia, in the State of Pennsylvania, party of the second part. Whereas, the premises hereinafter described have been conveyed by the said party of the second part to the said parties of the first part,

by deed bearing even date herewith, and containing the
 3366 usual full covenants, and in particular, a covenant against
 the right of dower of Catharine N. Forrest, the wife of
 the said Edwin Forrest, a release or discharge of which
 cannot now be obtained, and it has been agreed that
 part of the purchase money should be left on mortgage,
 as a further guarantee or security against any claim of
 the said Catharine N. Forrest. And whereas, in pursu-
 ance of such agreement, and also to secure the payment
 of part of the purchase money of the said premises, the
 said parties of the first part have this day executed and
 delivered to the said party of the second part their bond,
 3367 of even date herewith, in the penal sum of one hundred
 and fifty thousand dollars, conditioned for the payment
 to the said Edwin Forrest, his executors, administrators
 or assigns, the sum of seventy-five thousand dollars, at,
 or at the option of the said parties of the first part, in
 installments of not less than one thousand dollars each,
 at any and all times before the expiration of twenty
 years from the date thereof, with interest at the rate of
 six per cent. per annum, payable semi-annually, with a
 proviso that thirty-three thousand three hundred and
 thirty-three dollars of the said principal sum shall not
 become and be due and payable until six months after
 the release, discharge, or extinction of the right of dower
 3368 of the said Catharine N. Forrest, whether the same
 take place before or after the expiration of the said
 twenty years. And with this further proviso, that in
 case the said Catharine N. Forrest should survive the
 said Edwin Forrest, and recover her dower in said pre-
 mises, or any part thereof, then the interest on said sum
 of thirty-three thousand three hundred and thirty-three
 dollars should cease from the time of such recovery, and
 not run during the continuance of said dower, and that
 if the amount paid by the said obligors, their successors
 or assigns, to the said Catharine N. Forrest, or her as-
 3369 signs, as her dower in said premises, or any part

thereof, should exceed the interest accruing on said thirty-three thousand three hundred and thirty-three dollars subsequent to such recovery, then the surplus paid beyond such interest should be credited on said bond as so much paid towards the thirty-three thousand three hundred and thirty-three dollars ; and that on the extinction of said dower, by death, or otherwise, then the interest, at the rate aforesaid, on the said thirty-three thousand three hundred and thirty-three dollars, or so much thereof as might then remain unpaid, should survive and recommence from the time of such extinction, 3370 and be payable as aforesaid. And with the still further proviso, that in case, in a certain action now pending in the Superior Court of the city of New York, in which the said Catharine N. Forrest is plaintiff, and Edwin Forrest, aforesaid, is defendant, any alimony should be allowed to said Catharine N. Forrest, and the same should be made a lien on the said premises, and the above obligors should pay any portion thereof, then that the amount which the said obligors should so pay might and should be deducted by them, their successors or assigns, from any interest accruing thereafter on the said thirty-three thousand three hundred and thirty-three 3371 dollars, and that if the amount paid by the said obligors, their successors or assigns, for such alimony should exceed the interest accruing on said thirty-three thousand three hundred and thirty-three, then surplus paid beyond such interest should be credited on said bond as so much paid towards the said thirty-three thousand three hundred and thirty-three dollars. as by the said bond or obligation, and the condition thereof, and the proviso therein, reference being thereunto had, may more fully appear.

Now, this indenture witnesseth that the said parties 3372 of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, ac-

cording to the true intent and meaning thereof, and
 also for and in consideration of the sum of one dollar to
 them in hand paid by the said party of the second part,
 at or before the ensealing and delivery of these presents,
 the receipt whereof is hereby acknowledged, have
 granted, bargained, sold, aliened, released, conveyed,
 and confirmed, and by these presents do grant, bargain,
 sell, alien, release, convey, and confirm, unto the said
 3373 party of the second part, and to his heirs and assigns
 forever, all that certain tract, piece, or parcel of land,
 situate, lying and being in the town of Yonkers, in the
 county of Westchester, and State of New York, begin-
 ning at the south-easterly corner of said tract of land,
 which corner is formed by the westerly line of land
 formerly in the possession of Bishop Lawrence, and the
 line dividing the said tract from land now or late in the
 possession of John Horspool, and running thence north
 along the line of the land formerly of Bishop Lawrence,
 twenty degrees and fifteen minutes east, sixteen chains
 and forty-six links to a point in the southerly line of
 3374 land formerly of Samuel Lawrence; thence north along
 the said lands formerly of Samuel Lawrence, sixty-six
 degrees and forty minutes west, four chains and thirty-
 four links to a point; thence north, still along said last
 mentioned lands, sixty-seven degrees and forty minutes
 west, three chains and nineteen links; thence north, still
 along said lands, sixty-one degrees west, five chains and
 twenty-four links; thence north, still along said lands,
 fifty-four degrees forty minutes west, three chains and
 forty-seven links; thence north, still along said lands, sixty-
 seven degrees and forty minutes west, eighty-five links;
 3375 thence north, still along said lands, fifty-nine degrees and
 ten minutes west, one chain and seventy-five links;
 thence north, still along said lands, fifty-four degrees and
 thirty-five minutes west, three chains and thirty-three
 links; thence north, still along said lands, fifty-two de-
 grees west, two chains and thirty-four links; thence

north, still along said , forty-eight degrees and thirty minutes, one chain and ninety-one links; thence north, still along said land, forty-four degrees and forty-five minutes west, one chain and eighty-two links; thence north, still along said land, *land*, seventy-one degrees and 3376 fifteen minutes west, to the Hudson river; thence southerly, along the said Hudson river, to land of Lispenard Stewart; thence south, along the said Stewart's land, of fifty-seven degrees ten minutes east, seven chains and fourteen links, to a point in the southerly side of the road called the New Road, leading from the road called the Quarry Road to the residence of said Lispenard Stewart and the Hudson river; thence south, along the southerly side of said New Road, eighty-five degrees and five minutes east, fifty-eight links; thence south, still along the southerly side of said New Road, seventy-six degrees and twenty-five minutes east, two chains eighty links; thence south, still along 3377 the southerly side of said New Road, sixty-eight degrees and five minutes east, one chain; thence south, still along the southerly side of said New Road, sixty-one degrees and thirty-five minutes east, one chain and seventy-three links; thence south, still along the southerly side of said New Road, fifty-five degrees thirty minutes east, seven chains and twenty links, to a point; thence south, still along the southerly line of said New Road, one degree thirty minutes west, thirty-seven links, to a point on the westerly side of the said Quarry Road; thence south, along said Quarry Road, fifty-three degrees thirty minutes west, one chain and forty-eight links, to a point on the westerly side of said Quarry Road 3378 opposite the point the northerly line of the land of the aforesaid John Horspool strikes the easterly side of of said Quarry Road; thence south, across the said Quarry Road, and along the said line of the land of the said John Horspool, fifty-six degrees and twenty-five minutes east, fifteen chains and seventy links, to the place of be-

ginning, containing fifty-four acres and eight hundredths of an acre of land, be the same more or less. Subject to all the right, title and interest of the Hudson River Rail Road Company in so much of the land included
3379 within the above boundaries as well conveyed to them by the said Edwin Forrest, by deed dated July 3d, 1847, and also subject to the rights of the public in so much of the same as forms part of the new public highway, leading from the village of Yonkers to Spuyten Duyvil, and subject to such rights of way as now exist through and over the road running along the southerly boundary of said premises, together with all the right, title and interest of the said parties of the first part, of, in and to the land under the water lying in front of and adjoining said premises, and all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise ap-
3380 pertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof: and, also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: to have and to hold the above granted and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof, forever: provided, always, and these presents are upon this express condition, that if the said parties
3381 of the first part, or their successors, shall well and truly pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine and be void. And the said parties of the first

part, for themselves and their successors, do covenant and agree to pay, unto the said party of the second part, his executors, administrators or assigns, the said 3382 sum of money and interest, as mentioned above and expressed in the condition of the said bond. And if default shall be made in the payment of the said sum of money above mentioned, or the interest that may grow due thereon, or of any part thereof, that then and from thenceforth it shall be lawful for the said party of the second part, his executors, administrators or assigns, to enter into and upon all and singular the premises hereby granted, or intended so to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said parties of the first part, their 3383 successors or assigns, therein, at public auction, according to the act in such case made and provided, and, as the attorney of the said parties of the first part, for that purpose by these presents duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same. And out of the money arising from such sale to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisement and sale of the same premises, rendering the overplus of the purchase money (if any there shall be) 3384 unto the said parties of the first part, their successors or assigns, which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said parties of the first part, their successors and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from or under them, or either of them.

In witness whereof, the parties to these presents have caused their corporate seal to be affixed to this indenture, and their secretary to sign the same, the day and year first above written.

ELEANOR HICKEY, [L. s.]

3385

State of New York, City and County of New York, ss. :

On this thirteenth day of January, one thousand eight hundred and fifty-seven, before me came Eleanor Hickey, known to me to be the secretary of the above corporation, the Sisters of Charity of Saint Vincent de Paul, to me known to be such secretary, who, being by me duly sworn, did depose and say that she resides in the city of New York; that she is the secretary of said corporation; that the seal affixed to the above indenture is the corporate seal of said corporation, and affixed to
 3386 said indenture by the authority and direction of said incorporation.

ALEX. P. SHARP,
Comr. of Deeds.

State of New York, City and County of New York, ss. :

I, Richard B. Connolly, Clerk of the City and County of New York, do hereby certify that Alex. P. Sharp, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgment, a Commissioner of Deeds for said city, commissioned and sworn, and duly authorized to take the same; and further, that I am well acquainted with
 3387 the handwriting of such Commissioner, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my
 [L. s.] hand and affixed the seal of the county, the 31st day of January, 1851.

RICHARD B. CONNOLLY,
Clerk.

A true copy of the original mortgage and acknowledgment thereof. Recorded February 2d, 1857, at 30 min.
 past 3 o'clock, P. M.

JOHN P. JENKINS,
Clerk.

State of New York, County of Westchester, ss.:

I, John P. Jenkins, Register of the County of Westchester, do hereby certify that I have compared the foregoing copy of mortgage with the original thereof remaining of record in my office, and that the same is a correct transcript therefrom, and of the whole of such original, as recorded in my office in Liber 220 of Mortg., p. 58.

I further certify that there is no official seal belonging to this office. In testimony whereof I have here- 3389 unto set my hand this 1st day of June, 1859.

JOHN P. JENKINS,
Register.

Endorsed—"Sisters of Charity of St. Vincent de Paul to Edwin Forrest. Mortgage. Forrest v. Forrest. Ex. No. 19. A. C. Bradley, Ref."

3393 3392 3391 3390

ABSTRACT from the Papers of Edwin Forrest in relation to Lands in Michigan belonging to him.

| DESCRIPTION. | No. of Acres. | Court. | Date of Patent to Geo. Goodman. | Date of Deed to E. Forrest. | When made. | 1838-1839 | 1839 | 1840 | 1841 | 1842 | 1843-1844. | 1844. |
|--|---------------|------------|---------------------------------|-----------------------------|------------------|-----------|-----------------|-----------------|-----------------|-----------------|---------------|--------------|
| SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ N. 6 N. 6 W. | 40 35 | Ionia. | May 1, 1839... | Oct. 1, 1842... | Nov. 7, 1842... | ... | paid | paid | paid | paid | p'd by A.S.W. | paid by Hoos |
| N. frac. of NE. $\frac{1}{4}$ 4, 5 S. 18 W. | 51 100 | Berrien... | Do. do. | Oct. 1, 1842... | Oct. 29, 1842... | ... | paid | paid | paid | paid | p'd by A.S.W. | paid by Hoos |
| E. $\frac{1}{4}$ SE. $\frac{1}{4}$ 34, 1 N. 16 W. | 80 | Allegan... | Do. do. | Oct. 1, 1842... | Nov. 6, 1842... | ... | paid | paid | paid | paid | p'd by A.S.W. | paid by Hoos |
| E. $\frac{1}{4}$ NW. $\frac{1}{4}$ 6, 1 S. 16 W. | 80 | Berrien... | Do. do. | Oct. 1, 1842... | Nov. 6, 1842... | ... | ... | ... | ... | ... | p'd by A.S.W. | paid by Hoos |
| E. $\frac{1}{4}$ NW. $\frac{1}{4}$ 18, 5 N. 3 W. | 80 | Ionia. | Do. do. | Oct. 1, 1842... | Nov. 7, 1842... | ... | ... | ... | ... | ... | p'd by A.S.W. | paid by Hoos |
| W. frac. NE. $\frac{1}{4}$ 18, 5 N. 3 W. | 100 85 | Clinton... | Do. do. | Oct. 1, 1842... | March 8, 1842... | ... | ... | ... | ... | ... | p'd by A.S.W. | paid by Hoos |
| E. $\frac{1}{4}$ NE. $\frac{1}{4}$ 14, 7 N. 6 W. | 80 | Ionia. | Do. do. | Oct. 1, 1842... | Nov. 7, 1842... | ... | ... | ... | ... | ... | p'd by A.S.W. | paid by Hoos |
| E. $\frac{1}{4}$ SW. $\frac{1}{4}$ 14, 7 N. 6 W. | 80 | Do. | Do. do. | Oct. 1, 1842... | Nov. 7, 1842... | ... | paid | paid | paid | paid | p'd by A.S.W. | paid by Hoos |
| W. $\frac{1}{4}$ SE. $\frac{1}{4}$ 13, 1 S. 17 W. | 80 | Van Buren. | May 1, 1842... | No. deed to E. Forrest. | Nov. 7, 1842... | ... | paid | paid | paid | paid | p'd by A.S.W. | paid by Hoos |
| N. $\frac{1}{4}$ of NW. $\frac{1}{4}$ 6, 1 S. 16 W. | 40 25 | Do. | No. patent to Geo. Goodman. | No deed to E. Forrest. | ... | ... | paid | paid | paid | paid | p'd by A.S.W. | paid by Hoos |
| W. $\frac{1}{4}$ of SW. frac. 7, 4 S. 13 W. | 27 10 | Do. | ... | ... | Nov. 2, 1842... | ... | paid on all but | paid on all but | paid on all but | paid on all but | p'd by A.S.W. | ... |
| Kalamazoo Lots. | | | | | Nov. 2, 1842... | | 439 | 439 | | | | |
| No. 304, 305, 426, 439. | | | | | | | | | | | | |
| St. Joseph Lots. | | | | | | | | | | | | |
| No. 6 Block 71. | | | | | | | | | | | | |
| " 1 " 85. | | | | | | | | | | | | |
| " 2 " 86. | | | | | | | | | | | | |
| " 4 " 87. | | | | | | | | | | | | |
| " 6 " 71. | | | | | | | | | | | | |
| Niles Lots. | | | | | | | | | | | | |
| No. 22, 24 in Wm. B. Bee-son's addition. | | | | | | | | | | | | |
| Adjoin to Niles', also 2 oth-er lots. See G. Good-man's letter to P. S. Hoos, February 14, 1843. | | | | | | | | | | | | |
| Barny Court. | | | | | | | | | | | | |
| These all paid on these up to February 14, 1846. See G. Goodman's letter, p'd by A.S.W. February 14, 1846, with Mr. Forrest's package. | | | | | | | | | | | | |

Endorsement—"Edwin Forrest. Michigan Lands. Forrest vs. Forrest. Exhibit B. A. C. Bradley, Reg. P. S. Hoos, 3 Wall street."

Know all men by these presents, that I, Edwin Forrest, of the city of Philadelphia, in the State of Pennsylvania, in consideration of the love and affection which I bear to my three sisters, Henrietta, Caroline, and Eleanor, now residing at number 144 North Tenth street, 3394 in the said city, and for divers other good and valid considerations, do hereby give, grant, confirm and convey, unto my said sisters, all and singular the goods and chattels of which I at this time stand possessed.

In testimony whereof, I have hereunto set my hand and seal, this 2d day of October, one thousand eight hundred and fifty.

EDWIN FORREST, [L. s.]

Signed, sealed and delivered }
in presence of us, }

CHAS. KEMBLE, [L. s.]

ROBT. DONNELL, [L. s.]

W. H. MAURICE, [L. s.]

Filed Dec. 10, 1859.

(A Copy,)

GEO. T. MAXWELL,

3395

Clerk.

Exhibit D.

| 1848. | | 1848. | |
|-------|-------------------|--|--------|
| JULY | | JULY | |
| | 1. Rec'd \$100 00 | 1. Sundries..... | \$2 75 |
| | | 1. Raspberries and grapes | 3 00 |
| | | 2. Cakes | 1 00 |
| | | 2. Oil, alcohol & tomatoes | 1 12½ |
| | | 2. Eggs, butter, and fruit | 1 75 |
| | | 2. Pineapple | 31½ |
| | | 2. 2 parcels by Express. | 1 00 |
| 3396 | | 4. Eggs and fruit..... | 1 00 |
| | | 4. Sundries..... | 87½ |
| | | 6. Fruit..... | 50 |
| | | 6. Crockery and glass... | 11 50 |
| | | 6. Putting in coals..... | 50 |
| | | 6. Knife-sharpener | 1 00 |
| | | 6. Hope's bill..... | 8 62½ |
| | | 7. Mrs. Bedford..... | 10 00 |
| | | 7. Tomatoes, eggs, sund. | 1 00 |
| | | 8. Salmon | 1 25 |
| | | 8. Chickens and corn.... | 1 12½ |
| | | 8. Tomatoes and fruit... | 62½ |
| | | 8. Bag..... | 25 |
| | | 8. Fruit for preserves.. | 4 00 |
| | | 8. Woman to wash & wrk | 2 25 |
| | | 9. Pineapple, cake, & sun. | 1 87½ |
| 10. | 100 00 | 10. Brooms..... | 50 |
| | | 10. Eggs and butter..... | 1 12½ |
| | | 11. Bessey, for postage... | 10 10 |
| | | 11. Boxes of matches..... | 12½ |
| | | 12. Intelligence office.... | 50 |
| | | 12. Soap and starch..... | 75 |
| 3397 | | 12. Oil, salt, spices, &c... | 1 10 |
| | | 12. Preserve jars..... | 2 25 |
| | | 13. Chloride of lime | 50 |
| | | 15. Chamois leather | 62½ |
| | | 15. Fruits (currants), for
preserves..... | 2 00 |
| | | 15. Do. for eating..... | 31½ |
| | | 15. Salmon and tomatoes.. | 25 |
| | | 15. Groceries and fruits.. | 5 25 |
| | | 17. Sunday papers..... | 15 |
| | | 17. Stage riding..... | 12½ |

Car'd for'd \$200 00

1848.

JULY

Bro't for'd \$200 00

1848.

JULY

| | | |
|------------------------------|-------|------|
| 18. Mrs. Bedford..... | 20 00 | |
| 18. Woman day's work.... | 75 | |
| 18. Soap..... | 25 | |
| 19. Sundries in kitchen... | 62½ | |
| 19. Lard and butter..... | 62½ | |
| 20. Berries and cakes..... | 50 | |
| 22. Eggs, tomatoes & fruit. | 1 10 | |
| 23. Sunday papers..... | 12½ | 3398 |
| 24. Box of sardines..... | 75 | |
| 24. Whiting..... | 6½ | |
| 24. Scrubbing-brushes, 4.. | 75 | |
| 25. Oil, butter, &c..... | 1 62½ | |
| 25. Medicine..... | 25 | |
| 26. Locksmith, keys, &c.. | 2 12½ | |
| 26. Camphor..... | 56 | |
| 26. Eggs and tomatoes.... | 37½ | |
| 26. Soap..... | 50 | |
| 27. Charcoal..... | 50 | |
| 27. Wood and cutting.... | 2 75 | |
| 28. Carpet shaking..... | 4 00 | |
| 28. Putting down..... | 1 00 | |
| 28. Tacks..... | 12½ | |
| 29. Marketing W. M..... | 2 37½ | |
| 29. Eggs and butter..... | 87½ | |
| 29. Acc't book & stationery. | 1 25 | |
| 29. Candles..... | 84 | |
| 29. 2 women, 6 days..... | 12 00 | |
| 30. Papers..... | 15 | |
| 31. Chimney-sweeps..... | 1 25 | 3399 |
| Aug. | | |
| 1. Johnson, whitewashers | 20 00 | |
| 2. Toilet set & candlesticks | 11 50 | |
| 2. Stage riding..... | 25 | |
| 3. Cleaning out cellar... | 1 00 | |
| 3. 2 women, 2 days..... | 4 00 | |
| 4. Alcohol..... | 6½ | |
| 5. Salmon..... | 1 12½ | |
| 5. Peaches and pears.... | 1 25 | |
| 5. Ham and tongue..... | 1 25 | |
| 8. Peaches..... | 75 | |
| 9. Peaches and salmon.. | 2 25 | |

Car'd for'd \$200 00

1944

| 1848. | | 1848. | |
|-------------|----------|-------------------------------|-------|
| Aug. | | Aug. | |
| Bro't for'd | \$200 00 | | |
| | | 9. Eggs and butter..... | 1 37½ |
| | | 10. Package of starch.... | 62½ |
| | | 10. Mouse traps and paper | 31½ |
| 11. Rec'd | 24 00 | 11. Plating castors and salts | 13 00 |
| | | 11. Home Jour. to June 3d. | 2 00 |
| | | 11. Brandy..... | 75 |
| 12. | 20 00 | 11. Keg of whisky..... | 2 25 |
| | | 11. Parcel..... | 25 |
| 3400 | | 12. Peaches..... | 1 00 |
| | | 12. Ochra..... | 25 |
| | | 12. Smith & Torrey..... | 11 75 |
| | | 12. Eggs and butter..... | 75 |
| | | 13. Sunday papers..... | 16 |
| | | 14. Chamois leather..... | 50 |
| | | 15. Peaches and ochra.... | 1 12½ |
| | | 15. Mangling, 3 weeks.... | 1 37½ |
| | | 16. Peaches, ochra, &c.... | 1 12½ |
| 16. | 20 00 | 16. Plat'g sugar & milk pot | 11 00 |
| | | 18. Brushes and blacking. | 56 |
| | | 19. Salmon..... | 87½ |
| | | 19. Pair chickens & tongue | 1 25 |
| | | 19. Peaches..... | 1 50 |
| | | 19. Fish for breakfast.... | 25 |
| | | 19. Pears..... | 25 |
| | | 19. Oil & sundries for k'n. | 1 75 |
| | | 19. Brandy..... | 75 |
| | | 20. Sunday papers..... | 15 |
| | | 21. Butter and eggs..... | 1 37½ |
| | | 22. Wine glasses..... | 2 25 |
| | | 22. Fruit..... | 1 37½ |
| 3401 22. | 20 00 | 22. Cake..... | 50 |
| | | 23. Tongue and ham..... | 1 87½ |
| | | 23. Chickens..... | 75 |
| | | 23. Salmon..... | 87½ |
| | | 23. Peaches..... | 1 00 |
| | | 24. Cider, 7 bottles..... | 1 12½ |
| | | 24. Sugar brown and white | 1 25 |
| | | 24. Soap..... | 50 |
| | | 24. Starch..... | 50 |
| | | 25. Eggs, butter and rice, | 1 87½ |
| | | 26. Herbs (Shaker)..... | 87½ |

Car'd for'd

1945

1848.

AUG.

Bro't for'd

1848.

AUG.

| | | | |
|-----|------------------------|-----|------|
| 26. | and brushes... | 1 | 06½ |
| 26. | Marketing (W. market) | 2 | 31½ |
| 27. | Sunday papers..... | | 15 |
| 28. | Mangling..... | | 62½ |
| 28. | Oysters..... | 1 | 50 |
| 28. | Lobster and chicken.. | 1 | 31½ |
| 28. | Alcohol..... | | 6½ |
| 28. | Lemons..... | 12½ | 3402 |
| 28. | Brandy..... | | 75 |
| 28. | Eggs and butter..... | 1 | 12½ |
| 29. | Oysters..... | | 50 |
| 29. | Basket for theatre.... | 7 | 50 |
| 29. | Candy and grapes.... | 1 | 75 |
| 30. | Marketing..... | 1 | 75 |
| 30. | Cider..... | | 50 |
| 31. | Peaches and pears.... | 1 | 00 |

SEPT.

1. Rec'd \$20 00

SEPT.

| | | | |
|----|--|----|------|
| 1. | Butter, lard & eggs... | 1 | 31½ |
| 1. | Tongue..... | | 75 |
| 1. | Mangling..... | | 62½ |
| 1. | Soap..... | | 50 |
| 2. | Melon..... | | 50 |
| 2. | Marketing, tripe, &c.,
Washington market. | 2 | 31½ |
| 3. | Sunday papers..... | | 15 |
| 4. | Medicine..... | | 25 |
| 4. | Arnica..... | | 50 |
| 4. | Flaxseed and lemons.. | | 18½ |
| 4. | Sugar..... | | 62½ |
| 4. | Tripe..... | 50 | 3403 |
| 5. | Tongue..... | | 75 |
| 5. | Postman..... | 3 | 00 |
| 5. | Butter..... | 1 | 00 |
| 5. | Peaches and plums... | 1 | 00 |
| 6. | Man putting in coal.. | 2 | 00 |
| 7. | Fruits and tripe..... | 1 | 12½ |
| 7. | Ochra, egg-plant, &c. | | 50 |
| 7. | Oil and sundries for K. | 1 | 87½ |
| 8. | Butter and eggs..... | 1 | 25 |
| 8. | Isinglass for jelly.... | 1 | 25 |

Car'd for'd

| 1848.
SEPT. | 1848.
SEPT. | |
|----------------|----------------|--|
| Bro't for'd | | |
| 9. Rec'd | 20 00 | 8. Flavoring extracts for K. 37½ |
| | | 9. Marketing bill..... 2 25 |
| | | 9. Oysters..... 1 00 |
| | | 9. Cakes..... 50 |
| | | 9. Grapes at H. Weller's 1 50 |
| | | 9. Coach hire..... 50 |
| | | 9. Lemons..... 12½ |
| | | 9. Brandy..... 75 |
| 3404 | | 9. Cider..... 50 |
| | | 10. Sunday papers..... 15 |
| | | 11. Mangling..... 50 |
| | | 12. Peaches and pears.... 75 |
| | | 12. Tongue..... 75 |
| | | 13. Lemons and flaxseed.. 18½ |
| | | 14. Robert's wages one mo.
to Aug. 25..... 8 00 |
| | | 14. Soap, sugar, sardines.. 1 87½ |
| | | 14. Brandy..... 75 |
| | | 14. Fruit and tripe..... 1 25 |
| | | 15. Mangling..... 75 |
| | | 16. Marketing, tongue, &c.
W. M..... 2 31½ |
| | | 16. Grapes at H. Weller's. 1 75 |
| | | 16. Cakes..... 62½ |
| | | 16. Butter, eggs, and sun-
dries..... 1 12½ |
| | | 17. Oysters..... 2 00 |
| | | 17. Sunday papers..... 15 |
| | | 18. Peaches and pears.... 87½ |
| 3405 | | 19. Alcohol..... 6¼ |
| | | 19. Peaches..... 50 |
| | | 19. Oysters..... 1 00 |
| | | 20. Black ink..... 12½ |
| | | 20. Born, baker..... 17 06¼ |
| | | 20. Fruits..... 87½ |
| | | 22. Peaches and pears.... 1 00 |
| | | 22. Sugar and soap..... 1 37½ |
| | | 22. Mangling..... 75 |
| | | 22. Oysters..... 50 |
| | | 23. Westerfield, cleaning
range..... 4 75 |
| Car'd for'd | | |

1848.

SEPT.

Bro't for'd

1848.

SEPT.

| | | | |
|-------------------|-----------------------------|-------|------|
| | 23. Tongue..... | 75 | |
| | 23. Peaches, plums, & pears | 1 12½ | |
| | 23. Lemons..... | 12½ | |
| | 23. Cakes..... | 50 | |
| | 24. Sunday papers..... | 15 | |
| | 24. Oysters..... | 75 | |
| 25. Rec'd \$30 00 | 26. Soap, blue, and starch, | 1 00 | |
| | 27. Pitcher for water.... | 2 00 | |
| | 27. 1 doz. cups & saucers, | 4 00 | 3406 |
| | 27. Basket..... | 1 50 | |
| | 28. Pears..... | 25 | |
| | 29. Mangling..... | 87½ | |
| 30. 10 00 | 29. Oysters and boned tur- | | |
| | key..... | 4 00 | |
| | 30. Marketing, fruit, &c.. | 1 62½ | |

Oct.

Oct.

| | | | |
|------------|------------------------------|-------|------|
| | 1. Sunday papers..... | 15 | |
| | 2. Postman's bill..... | 2 75 | |
| | 2. Boned turkey..... | 3 00 | |
| | 4. Oysters..... | 75 | |
| | 4. Fruit..... | 37½ | |
| | 4. Candles..... | 84 | |
| | 5. Stage riding..... | 12½ | |
| 7. 100 00 | 7. Flaxseed and camphor, | 56¼ | |
| | 7. Gum, glue, and station- | | |
| | ery..... | 87½ | |
| | 7. Mending E. boots.... | 62½ | |
| | 10. Oysters..... | 37½ | |
| | 10. Cakes and flowers.... | 87½ | |
| | 10. Roe Lockwood, bill... | 5 62½ | |
| | 12. Mangling, 2 weeks... | 1 50 | 3407 |
| | 13. Flanagan, bill, sundries | 11 40 | |
| | 14. Tribune, 2 weeks.... | 25 | |
| | 14. Servants to the Fair.. | 1 00 | |
| | 15. Sunday papers..... | 15 | |
| | 15. Charcoal..... | 50 | |
| 7. \$20 00 | 17. Whitewashing..... | 1 00 | |
| | 19. Carriage of wagon from | | |
| | oston..... | 7 50 | |
| | 19. Apples and crackers. | 18¼ | |

Car'd for'd

1848.

Oct.

Bro't for'd

3408

1848.

Oct.

| | |
|--|-------|
| 19. 2 Pie dishes..... | 62½ |
| 20. Chloride of lime..... | 12½ |
| 20. Mangling | 87½ |
| 20. Robert in full to 25th | 16 00 |
| 20. Cartridge paper & wax. | 62½ |
| 21. Sundries..... | 87½ |
| 22. Papers | 6¼ |
| 23. Basket for grapes to H. | 37½ |
| 23. Carriage of grapes to H. | 50 |
| 23. Stage riding..... | 12½ |
| 24. Oysters | 50 |
| 25. Stage riding to take
basket for E. | 12½ |
| 25. Red ink..... | 6¼ |
| 26. Charcoal | 50 |
| 26. Brooms and oil | 2 37½ |
| 26. Apples | 6¼ |
| 27. Oysters | 50 |
| 28. 3 loads wood & cutting | 4 25 |
| 30. Postage 1 month..... | 1 87½ |
| 30. Catherine wages, 2 m's. | 10 00 |

Nov.

1. Rec'd \$60 00

| | |
|--------------------|------|
| 30. Oysters..... | 1 00 |
| 30. Charcoal | 25 |

Nov.

3409

| | |
|--|------|
| 1. Kiernan cleaning fur-
naces..... | 3 00 |
| 1. Carriage of books..... | 2 50 |
| 1. Candles | 84 |
| 1. Oysters | 1 00 |
| 1. 1 dozen cha'ge glasses. | 4 50 |
| 2. Oysters | 1 00 |
| 3. Mangling, 2 weeks.... | 2 00 |
| 3. Oysters | 50 |
| 3. Lemons | 25 |
| 4. Sundries for K..... | 62½ |
| 4. Oysters | 75 |
| 4. Cake..... | 50 |
| 4. Lemons | 18¼ |
| 7. Oysters | 75 |

Car'd for'd

1848.

Nov.

Bro't for'd

1848.

Nov.

| | | | | |
|------------------|--------|---|-------|------|
| | | 7. Stage riding..... | 12½ | |
| | | 8. Mrs. B..... | 10 00 | |
| | | 8. Oysters | 75 | |
| 9. Rec'd \$40 00 | | 10. Brooms | 31½ | |
| | | 10. Oysters | 75 | |
| | | 10. Mangling | 1 00 | |
| | | 11. Oil and sundries..... | 1 87½ | |
| | | 11. Cake..... | 50 | |
| | | 12. Sunday papers..... | 15 | |
| | | 13. Oysters | 50 | 3410 |
| | | 14. Oysters..... | 50 | |
| | | 14. Carriage parcel (book) | 37½ | |
| | | 14. Tribune | 37½ | |
| | | 15. Marketing | 1 12½ | |
| | | 15. Oysters | 50 | |
| | | 15. Mangling | 87½ | |
| | | 15. 6 tumblers..... | 1 50 | |
| | | 15. Charcoal | 50 | |
| | | 16. Tribune | 25 | |
| | | 16. Oysters | 75 | |
| | | 17. Butter, apples and sun-
dries | 1 87½ | |
| | | 17. Mangling | 87½ | |
| | | 17. Glass dish (large) | 3 00 | |
| | | 18. Oysters | 1 00 | |
| | | 18. Arnica | 50 | |
| | | 18. Tongue, tripe, and W'n
market | 2 87½ | |
| | | 18. Stage riding..... | 25 | |
| 19. | 190 00 | 18. Charcoal..... | 50 | |
| | | 19. Sunday papers..... | 25 | |
| | | 19. Oysters for soup..... | 1 00 | 3411 |
| | | 20. Teapot and crockery .. | 4 75 | |
| | | 20. Stage riding..... | 12½ | |
| | | 20. Cakes | 50 | |
| | | 22. Locksmith | 1 75 | |
| | | 22. Mending lib'y chair ... | 75 | |
| | | 22. Stage riding to Express
office | 12½ | |
| | | 23. Mangling and oysters .. | 1 87½ | |

Car'd for'd

1848.
Nov.
Bro't for'd

1848.
Nov.

3412

| | | |
|-----------------------------|----|-----|
| 23. Load of wood & cutting | 2 | 75 |
| 23. Mrs. Bedford on account | 10 | 00 |
| 24. Boyd's tickets | | 25 |
| 24. Tribune | | 25 |
| 25. Hone, baker | 35 | 00 |
| 25. Oysters | | 50 |
| 25. Butter | | 75 |
| 25. Jarvis' cold candy.... | | 37½ |
| 28. Arnolte & Cunjetion... | 1 | 12½ |
| 28. Mangling | 1 | 12½ |
| 28. Butter | | 75 |
| 28. Charcoal | | 50 |
| 30. Cakes and honey | | 75 |
| 30. Anne, 3 months | 21 | 00 |
| 30. Barrel apples | 2 | 50 |
| 30. Oysters | | 75 |
| 30. Eggs | | 75 |

Dec.

Dec.

3413

9. Rec'd \$35 00

| | | |
|---|---|-----|
| 1. Butter | | 87½ |
| 1. Griddle & match boxes | 3 | 50 |
| 2. Tribune | | 25 |
| 2. Postage | 2 | 87½ |
| 2. Oysters | 1 | 00 |
| 2. Cakes | | 50 |
| 2. Sunday papers | | 25 |
| 2. Postage, part of broker | | 50 |
| 2. Butter and eggs | 1 | 75 |
| 2. Mangling | | 87½ |
| 2. Sundries for house.... | | 56 |
| 2. During my absence... | 1 | 25 |
| 11. Oysters | | 50 |
| 11. Charcoal | 1 | 00 |
| 13. Sundries for kitchen.. | 1 | 12½ |
| 14. Ball and faucet plumb-
ers | 4 | 75 |
| 14. Stage-riding and papers | | 25 |
| 15. Tuning piano | 1 | 00 |
| 15. Mangling | | 75 |
| 15. Eggs and butter | 1 | 50 |
| 15. Honey | | 25 |

Car'd for'd

1848.

Dec.

Bro't for'd

-1848.

Dec.

| | | | |
|---|----|-----|------|
| 15. Yellow bowls and
crockery..... | 1 | 87½ | |
| 16. Oysters..... | | 50 | |
| 16. Friction matches, 18
boxes..... | 1 | 00 | |
| 16. Bottle of ink..... | | 37½ | |
| 16. Stage-riding..... | | 12½ | |
| 17. Sunday papers..... | | 25 | 3414 |
| 17. Tribune..... | | 25 | |
| 18. Sundries for kitchen.. | | 56 | |
| 18. Butter..... | | 75 | |
| 18. Raisins..... | | 25 | |
| 20. Hyacinth glasses.... | | 50 | |
| 20. Canister for coffee.... | | 25 | |
| 20. Mending kitchen uten-
sils..... | | 87½ | |
| 21. Eggs and butter..... | 1 | 25 | |
| 21. Mangling..... | 1 | 12½ | |
| 21. Oil and mustard..... | | 87½ | |
| 21. Bay rum..... | | 37½ | |
| 22. Oysters..... | | 75 | |
| 22. Charcoal..... | 1 | 00 | |
| 22. Load of wood and cut-
ting..... | 2 | 75 | |
| 23. Sundries for house.... | 1 | 12½ | |
| 23. Christmas for servants'
dresses, &c..... | 10 | 00 | |
| 23. Poor people..... | | 50 | |
| 23. Oysters and cakes.... | 1 | 25 | |
| 23. Servants' dresses..... | 1 | 50 | 3415 |
| 24. Sunday papers..... | | 25 | |
| 24. Oysters..... | | 50 | |
| 25. Christmas boxes, poor
people..... | 1 | 00 | |
| 26. Philadelphia butter... | 1 | 00 | |
| 27. Sundries..... | | 37½ | |
| 27. Putting in coals..... | | 25 | |
| 28. Oysters, herbs, &c.... | 1 | 12½ | |
| 28. Postage..... | 3 | 25 | |
| 28. Two dozen lemons.... | | 37½ | |

Car'd for'd

| | | | |
|------------------|--|-------------------------------------|-----------------|
| | | 1848. | |
| | | DEC. | |
| Bro't for'd | | | |
| | | 28. Butter and eggs..... | 1 12½ |
| | | 28. Mangling..... | 1 12½ |
| | | 29. New Year's cakes.... | 5 87½ |
| | | 29. Charcoal..... | 1 50 |
| 3416 | | 29. Alcohol..... | 10 |
| | | 30. Butter..... | 75 |
| | | 30. Eggs..... | 50 |
| | | 31. Sunday papers..... | 25 |
| | | 31. Sewing girl, 1 month.. | 5 00 |
| | | 1849. | |
| | | JAN. | |
| | | 2. Oysters..... | 1 00 |
| | | 2. Cakes and crackers... | 62½ |
| | | 4. Oysters..... | 75 |
| | | 4. Butter and eggs..... | 1 50 |
| 6. Rec'd \$30 00 | | 6. Fish at W. market... | 75 |
| | | 6. Sausage and sausage
meat..... | 1 00 |
| | | 6. Horse radish, put up.. | 25 |
| | | 6. Cauliflower..... | 37½ |
| | | 6. Tripe..... | 87½ |
| | | 6. Herbs..... | 25 |
| | | 6. Stage riding..... | 25 |
| | | 6. Cranberries..... | 25 |
| 3417 | | 6. Oysters..... | 50 |
| | | 7. Sunday papers..... | 25 |
| | | 7. Oysters..... | 50 |
| | | 8. Gregory's bill..... | 6 88 |
| | | 8. Sweet Oil..... | 25 |
| | | 10. Sausages..... | 50 |
| Omitted } 10 00 | | 11. Tripe and sausage meat | 1 37½ |
| Nov. 18, } | | 11. Philadel'a butter, 8 lbs. | 3 00 |
| | | 50 | |
| | | 11. Paid sundries for E.. | 147 17 |
| | | 12 75 | |
| | | <u>\$862 25</u> | <u>\$862 25</u> |

1653

1849.
JAN.

1849.
JAN

| | | | |
|-------------------|---|--------------------|------|
| | 14. Sunday papers..... | 18 $\frac{1}{4}$ | |
| | 15. Putting in 11 ton of
coal..... | 2 75 | |
| | 15. Tribune..... | 25 | |
| | 17. Sausages..... | 50 | |
| | 21. Sunday papers..... | 18 $\frac{1}{4}$ | |
| | 22. Kerr's bill (crookery,
&c.)..... | 9 25 | |
| | 23. Mending candelabra.. | 1 00 | |
| | 23. Stage riding..... | 12 $\frac{1}{2}$ | 3418 |
| | 23. Postage..... | 6 $\frac{1}{4}$ | |
| | 24. Mangling, 1 month... | 5 25 | |
| | 24. Butter..... | 1 50 | |
| | 25. Oysters..... | 50 | |
| | 25. Mrs. Bedford..... | 5 00 | |
| | 26. Hyacinth glasses..... | 75 | |
| | 26. Charcoal..... | 50 | |
| | 28. Sundries..... | 31 $\frac{1}{4}$ | |
| | 29. Sunday papers..... | 18 $\frac{1}{4}$ | |
| | 30. Smith, bn account.... | 30 00 | |
| | 30. Oysters..... | 25 | |
| | 31. Mangling, one week.. | 1 12 $\frac{1}{2}$ | |
| 30. Rec'd \$90 00 | 2. Plumber's bill..... | 4 25 | |
| | 2. Damask for Macbeth.. | 10 00 | |
| | 2. Turkey red, 7 yards,
at 43 $\frac{1}{4}$ c..... | 3 06 $\frac{1}{4}$ | |
| | 2. Ribbon, 1 piece, and
silk..... | 1 12 $\frac{1}{2}$ | |
| | 3. Mending trunk..... | 50 | |
| | 3. Catharine..... | 5 00 | |
| | 3. Stage riding..... | 12 $\frac{1}{2}$ | 3419 |
| | 3. Chloride of lime..... | 25 | |
| | 3. Lining and mending
coat..... | 4 50 | |
| | 4. Sunday papers..... | 18 $\frac{1}{4}$ | |
| | 4. Oysters..... | 50 | |
| | 5. Charcoal..... | 50 | |
| | 6. Anne's wages, 4 months | 28 00 | |
| | 6. Brooms..... | 50 | |
| | 6. Tribune..... | 25 | |
| | 7. Cobb, in full, for butter | 4 13 | |

Card for'd

1849.

Feb.

Bro't for'd

1849.

Feb.

| | | | | | |
|-----------|------|----|---|----|-----|
| | | | 7. Black silk, cord and buttons..... | 1 | 37½ |
| | | | 7. Candy | | 12½ |
| | | | 7. Stage riding | | 12½ |
| | | | 9. Sausage meat, tripe, &c. | 1 | 31¼ |
| | | | 10. 3 yards velvet, at \$4.50..... | 13 | 50 |
| 10. Rec'd | \$30 | 00 | 10. Linen linings.... | 1 | 00 |
| 3420 | | | 10. Black satin cravat | 4 | 00 |
| | | | 10. Black silk handkerchiefs..... | 1 | 75 |
| | | | 10. Oysters | | 75 |
| | | | 10. Alcohol | | 6¼ |
| | | | 10. Cake | | 50 |
| | | | 11. Sunday papers..... | | 18¾ |
| | | | 12. Charcoal | 1 | 50 |
| 13. | 50 | 00 | 13. Yellow silk (lining)..... | 2 | 00 |
| | | | 13. 3 yds. bullion trimming, at \$3.... | 9 | 00 |
| | | | 13. 2 yards & half bullion trimming, at \$2 | 5 | 00 |
| | | | 13. 1 doz. bullion flowers..... | 5 | 00 |
| | | | 13. Two yards bullion fringe, at \$1.50 | 3 | 00 |
| | | | 13. Two yards bullion fringe, at \$1.25 | 2 | 50 |
| 3421 | | | 13. 1 piece gimp (gold) | 2 | 00 |
| | | | 13. Set of buttons... | | 75 |
| | | | 13. Yellow sewing silk | | 50 |
| | | | 13. 3 yds. blue merino | 6 | 00 |
| | | | 13. ¾ yds. scarlet | 1 | 50 |
| | | | 13. 1 pair silk gloves | | |
| | | | 13. Box of quill pens | | 25 |
| | | | 13. Stage riding..... | | 12½ |
| | | | 14. Oysters | 1 | 00 |
| | | | 14. Postage | | 6¼ |
| | | | 15. Binding-fringe and ribbon | 1 | 25 |

Car'd for'd

CATHARINE N. FORREST

against

EDWIN FORREST.

Exceptions taken and filed by defendant to the report of Alvin C. Bradley, Esquire, Referee in this case, dated December 1st, 1859, and filed December 10th, 1859.

Defendant excepts to the finding, by said Referee, as facts:

- 1st. That the property called Fonthill was prepared and embellished for a residence, at an expenditure of nearly \$80,000.
- 3424 2d. That the expenses of the plaintiff in prosecuting this suit, not taxable as costs merely, amount to about \$7,000.
- 3d. That the value of the defendant's property at Yonkers is \$36,000, and that at Covington is \$20,000.
- 4th. That no part of the property, referred to in the report as having been purchased in the name of the defendant's sisters, or some of them, was either paid for directly or indirectly by them, and that he was not indebted to them in any sum whatever at the time of such purchase.
- 5th. That all the property that purported to be given to defendant's sisters remained subject to the control and disposal of the defendant, and is held for him on secret trust, and remains and is his own still.
- 3425 6th. That the aggregate present value of the property of the defendant, not including the household furniture, is \$268,722.
- 7th. That it does not appear what income plaintiff has received since the judgment in this cause.

Defendant also excepts to the following propositions, contained in the opinion of the Referee, filed with his said report.

- 1st. That the allowance to the plaintiff should be determined by the circumstances of the parties as they existed, not at the date of the judgment, but at the time when the investigation into 3426 them is made.
- 2d. That the wealth of defendant is not only to be looked to, in order to determine his ability to pay the allowance, but also to determine what amount is suitable to allow.
- 3d. That having regard to the circumstances of the parties at the date of his report, and keeping in mind not only the sort of maintenance which the plaintiff had received during the cohabitation, but also the expectations justly inspired by the purchase and erection of Fonthill as a future residence, and the more elevated social rank intended thereby to be maintained, and considering 3427 further, that although the unhappy events which caused the separation prevented the accomplishment of this purpose, yet that the defendant has, since the divorce, carried out in part the same purpose, by the purchase of his present residence, which, though two-thirds less valuable than Fonthill, is yet three times more valuable than the dwelling which they occupied in New York ; having regard to all these, the sum of \$4,000 will be such a suitable allowance to her annually, for her support, as is just.
- 4th. That defendant gave plaintiff to understand in the 3428 most solemn form, when he married her, that where he went she might go, that what he should acquire she should share, and that where he died she might die, and there be buried.
- 5th. That of the annual income received during nearly

the whole period since the divorce, nearly every thing has vanished, so that even defendant can account for no part of it.

- 3429 6th. That in all defendant's prosperity, after the judgment of divorce, it was just plaintiff should have shared.
- 7th. That by the judgment of the Court, plaintiff's obligations as a wife disappeared, while those of defendant, as a husband, remained.
- 8th. That the allowance should begin at the commencement of the suit.
- 9th. That the heavy expenses rendered indispensable for the plaintiff to incur, by defendant's resistance to the relief she was entitled to, were enough to absorb, during the time it continued, not only the sum awarded by said report, but also the other allowances made to her by defendant.
- 3430 10th. That though plaintiff, by second nuptials, should become entitled to a double maintenance, this would be her good, but not defendant's evil fortune. That defendant can have no more interest in plaintiff's acquisitions, subsequent to the divorce, when they come by marriage than when they come from exertions of the needle or the pen, from the concert or the theatre, or by devise or inheritance—defendant has no interest in them at all.
- 11th. That, though it might happen that no part of the allowance received from defendant should be in fact applied to plaintiff's maintenance, yet defendant cannot justly complain.
- 3431 12th. That the law secures to the wife a sum equal to her suitable support. If, by curtailing some luxuries, or even dispensing with some necessities, any thing be saved for charity, for affection, for gratitude, or even for accumulation,

and thereby lawful ends, otherwise beyond her reach, be attained, she sacrifices not her husband's wealth, but her own enjoyments.

- 13th. That, if, from any other source, as by her own industry, by marriage, or from the affection of the dead, plaintiff be enabled not to forego enjoyments, and yet to save her whole allowance, defendant suffers no wrong. 3432
- 14th. That the allowance once fixed becomes a mere sum in gross, payable at stated periods, and to be employed by the recipient at pleasure.
- 15th. That, in a word, the allowance becomes a debt, the defendant a debtor, the plaintiff a creditor, and the plea that the creditor has money enough already might be interposed as a bar by any other debtor as well as by him.

Defendant also excepts to the said report :

- 1st. That said referee has decided that the allowance of alimony should commence on the 19th day 2433 of November, 1850, or at any other date prior to the entry of judgment, on the 31st day of January, 1852.
- 2d. That the said referee has refused to deduct from said allowance the various sums paid by defendant to plaintiff since the commencement of this suit.
- 3d. That said referee, in making said allowance, refused to credit or take into consideration any and all sums now or heretofore received by plaintiff, from her earnings or any other source, since the commencement of this suit. 3434
- 4th. That said referee, in fixing said allowance, refuses to consider or take into account the pecuniary circumstances of plaintiff.

- 5th. That said referee refuses to direct or decide that said allowance should be affected by the future marriage of said plaintiff or the death of said defendant.
- 6th. That said referee has decided that the sum of \$4,000 per annum ought to be paid to said plaintiff by said defendant, from and after the commencement of this suit.
- 3435 7th. That said referee has decided that a sum equal to \$4,000 a year, from the commencement of this suit until the confirmation of said report, ought to be paid to said plaintiff within 30 days from the confirmation of said report.
- 8th. That said referee has based said allowances to said plaintiff on the estimated value of defendant's property at the date of executing said reference.
- 9th. That said referee has not based said allowances on the income derived from said estate or its productiveness.
- 3436 10th. That said referee has refused to receive competent and proper testimony offered by defendant, to which refusal exception was duly taken on said hearing, as appears on the face of said report.
- 11th. That said referee has admitted illegal and irrelevant testimony, offered by plaintiff, to which admission exception was duly taken on said hearing, as likewise appears on the face of said report.
- 12th. That said referee has not stated separately his conclusions of law and of fact in the manner required by law.
- 3437 13th. The defendant also excepts separately to each

and every ruling of the referee during said reference, adverse to this defendant.

- 14th. The defendant also excepts separately to each and every conclusion of law and of fact by the referee stated in the report so filed as aforesaid.

VAN BUREN & BURNHAM,
Def't's Att'ys.

JAMES T. BRADY, }
J. VAN BUREN, } *of Counsel.*

At a Special Term of the Superior Court of 3438
the city of New York, held in the City
Hall, in said city, on the thirty-first day
of December, one thousand eight hundred
and fifty-nine,

Present—The Honorable LEWIS B. WOODRUFF, *Justice.*

CATHARINE N. FORREST

against

EDWIN FORREST.

On the printed case made in this cause, and upon the pleadings, proceedings, verdict, bill of exceptions, and the judgments of the Special Term and General Term of this Court, and the other papers used by the 3439 parties, respectively, on the denial of the defendant's motion for a commission to California, decided by order of the 25th day of June, 1859; the order for an allowance made in this cause on the 22d day of July last, and the papers on which said last-mentioned order was made, the two orders for the defendant to show cause,

made by Mr. Justice Woodruff, bearing date respectively on the 16th and 17th days of December, 1859; the affidavits of the plaintiff and Nelson Chase; the affidavits of service upon the attorneys for the defendant of said
 3440 orders to show cause; the affidavits of John Van Buren and the defendant, and upon the report of Alvin C. Bradley, Esq., the Referee in this action, bearing date the 1st day of December instant, and which was filed in the office of the Clerk of this Court, on the 10th day of the said month of December, and the order made in this cause in open Court on the 20th day of December instant, on the argument of this motion vacating the stay of plaintiff's proceedings herein; Charles O'Connor having been heard for the plaintiff, and John Van Buren and James T. Brady, Esquires, having been heard for the defendant—It is now ordered, that to enable the
 3441 plaintiff to carry on this action, the defendant pay to her use, during the pendency of this suit, two hundred and fifty dollars on the first Monday of each month hereafter, and for her support and maintenance, commencing on the first Monday of February next.

And it is further ordered, that such payments be made on the respective days above specified, between the hours of twelve at noon and one in the afternoon, respectively, at the office of Howland & Chase, attorneys for the plaintiff in this action, number forty-six Exchange place, in the city of New York, and into the hands of her said attorneys, or one of them, or at the office, for
 3442 the time being, of her Attorneys of Record for the time being, and into the hands of one of them.

And it is further ordered, that each of such monthly payments, when made, shall be deemed a full discharge of the monthly payment required to be made by the said defendant, at the same time, under the said order made in this action, dated on the 22d day of July last.

And it is further ordered, that the motion of the said

plaintiff, so far as it seeks a further specific allowance for counsel fees, be denied. 3443

And it is further ordered, that the costs of this motion, at ten dollars, shall abide the final disposition of costs in this cause.

(A copy.)

• GEO. T. MAXWELL,
Clerk.

At a Special Term of the Superior Court of the city of New York, held at the City Hall of the city of New York, on the twenty-first day of May, one thousand 3444 eight hundred and sixty,

Present—The Honorable JAMES MONCRIEF, *Justice*.

| | |
|-----------------------|---|
| CATHARINE N. FORREST, | } |
| Plaintiff, | |
| <i>against</i> | |
| EDWIN FORREST, | |
| Defendant. | |

A judgment and decree, dissolving the marriage between the above-named plaintiff and the above-named defendant, having been heretofore pronounced in this action at a Special Term of this Court, held before the 3445 Honorable Thomas J. Oakley, then Chief Justice of this Court, and duly entered on the thirty-first day of January, one thousand eight hundred and fifty-two, for the adultery of the said defendant ; and the said action being now brought on to a further trial before this Court, on the prayer of the said plaintiff for a further decree, order

or judgment of this Court thereupon, pursuant to the statute in that behalf, compelling the said defendant to provide such suitable allowance to the said plaintiff, for
 3446 her support, as this Court shall deem just, having regard to the circumstances of the parties respectively; and the plaintiff having (amongst other things) produced the said judgment and the order of this Court, made in this action at a General Term, on the twenty-fourth day of July, one thousand eight hundred and fifty-six, and the respective orders of this Court respectively made at Special Terms thereof, on the twenty-second day of July, one thousand eight hundred and fifty-nine, and the thirty-first day of December, one thousand eight hundred and fifty-nine; and the report of Alvin C. Bradley, Esquire, a referee herein, bearing date the first day of December, one thousand eight hundred and fifty-nine;
 3447 and the defendant having (amongst other things) produced the case or bill of exceptions made and used before the General Term of this Court, on the appeals heretofore taken from the aforesaid judgment pronounced at said Special Term, and also the exceptions taken by the said defendant to the said report, and also evidence of the payments by the defendant hereinafter mentioned; and Mr. Nelson Chase and Mr. Charles O'Connor having been heard for the plaintiff, and Mr. John Van Buren and Mr. James T. Brady and Mr. John W. Edmonds having been heard for the defendant, and mature deliberation having been thereupon had, it is now ordered that the said exceptions so taken to the said report be, and the same
 3448 hereby are overruled and disallowed; and it is further ordered that the said report be, and the same hereby is in all things confirmed. And in conformity with the said report, and the judgment and opinion of this Court, now here, of and upon the premises, it is now ordered, declared and adjudged that, having regard to the circumstances of the said parties, respectively, the sum of four thousand dollars in each year, from the nineteenth day

of November, one thousand eight hundred and fifty, when this action was commenced, during the continuance in life of both the said parties, payable in quarter-yearly installments, on the first day of February, May, August, and November in each year, was and is a suitable allowance to the said plaintiff for her support, to be 3449 provided by the said defendant, which allowance this Court, now here, doth deem just. And, inasmuch as the said defendant hath paid to the said plaintiff for her support during the pendency of this action, under the orders of this Court, the following sums, that is to say, on the first day of August, 1859, the sum of two hundred dollars; on the fifth day of September, 1859, the sum of two hundred dollars; on the third day of October, 1859, the sum of two hundred dollars; on the seventh day of November, 1859, the sum of two hundred dollars; on the fifth day of December, 1859, the sum of two hundred dollars; on the second day of January, 1860, the sum of two hundred dollars; on the 3450 sixth day of February, 1860, the sum of two hundred and fifty dollars; on the fifth day of March, 1860, the sum of two hundred and fifty dollars; on the second day of April, 1860, the sum of two hundred and fifty dollars, and on the seventh day of May, 1860, the sum of two hundred and fifty dollars, it is now declared and adjudged that after giving credit to the said defendant for the several payments so by him made, as aforesaid, there remains unpaid from the said defendant to the said plaintiff, on account of the installments of the said allowance, for the time now past, the sum of thirty-five 3451 thousand five hundred and ninety-three dollars.

And it is further ordered, decreed and adjudged that the said Edwin Forrest pay into the hands of the "United States Trust Company of New York," to the use of the said plaintiff, for her allowance as aforesaid, the last mentioned sum of thirty-five thousand five hundred and ninety-three dollars, within thirty days

from the entry of this order, and notice of such entry served upon the defendant's attorneys, and the further sum of one thousand dollars on the first day of each month of August, November, February, and May hereafter, during the continuance in life of
 3452 both the said plaintiff and the said defendant, and it is further ordered, decreed and adjudged, that as a reasonable security for the said allowance, the said defendant, within thirty days from the entry of this order and service of notice thereof as aforesaid, assign and transfer to the said Trust Company that certain mortgage for seventy-five thousand dollars and interest, executed unto him, the said defendant, as mortgagee, by the Sisters of Charity of St. Vincent de Paul, as mortgagors, bearing date on the twentieth day of December, in the year one thousand eight hundred and fifty-six, and the bond of
 3453 mortgage is recorded in the office of the Register of Deeds, in and for the county of Westchester, in book number 220 of Mortgages, beginning at page fifty-eight of such book.

And it is further ordered, that so long as the said defendant shall punctually pay the allowance aforesaid as the several payments and installments thereof are hereby directed to be paid, the said Trust Company shall account for and pay over to him, the said defendant, or his assigns, all such interest on such bond and mortgage as shall be received by said Trust Company. And it is further ordered, that no payment or disposition of any
 3454 principal moneys, secured by the said bond and mortgage, shall be made by the said Trust Company, except in pursuance of the order of this Court, in this action, for that purpose first had and obtained.

And it is further ordered, that the said defendant be at liberty at any time or times hereafter, during the continuance in life of both the said parties, to apply to

this Court, on the foot of this judgment, for leave to change said security and to substitute other adequate security for such allowance.

And it is further ordered, that the said plaintiff be at liberty, at any time or times hereafter during the continuance in life of both the said parties, to apply to this Court, on the foot of this judgment, as she may be advised, to compel said defendant to give other or further security for the payment of said allowance or any part thereof, that may be from time to time in arrear, and for such other and further orders and proceedings in the premises as may be proper and necessary to compel the said defendant to provide and punctually pay such allowance as aforesaid, or any installment thereof. 3455

And it is further ordered, decreed, and adjudged that the said defendant pay to the said plaintiff her costs and disbursements of the proceeding in this behalf in this action, subsequently to the aforesaid judgment of this Court, pronounced at Special Term, in the year one thousand eight hundred and fifty-two, in this action, to be adjusted and allowed and certified at the foot of this judgment, according to the course and practice of this Court; and the said costs and disbursements having been duly adjusted at the sum of nine hundred and sixty-six dollars and ninety-eight cents, it is further ordered that the said plaintiff have execution therefor against the said defendant, and also for the sum of thirty-five thousand five hundred and ninety-three dollars above directed to be paid to the said Trust Company, unless the same shall be paid within the time above specified. 3456 3457

And it is further ordered, that upon the death of the said plaintiff, the said Trust Company, if then in possession of the said bond and mortgage, re-assign and redeliver the said bond and mortgage to the said defendant, his executors, administrators, or assigns.

And it is further ordered, decreed, and adjudged, that in case the said Catharine N. Forrest, the plaintiff, shall survive the said Edwin Forrest, the defendant, or any other
 3458 event shall occur materially changing the circumstances of the said parties, or of either of them, an application may be made on the foot of the judgment in this action, by any party in interest, for such modification of the said judgment, touching the said allowance for support, as may be just, in view of any right, title, or interest in or claim to the estate, real or personal, of the said Edwin Forrest, which may then have accrued to her by act and operation of law, or in view of any such other event.

Filed 2d June, 1860.

(A copy.)

GEO. T. MAXWELL,
 Clerk.

3459

NEW YORK SUPERIOR COURT—AT SPECIAL
 TERM, JUNE 4TH, 1860.

Present—HON. L. B. WOODRUFF, *Justice*.

| | |
|----------------------|---|
| CATHARINE N. FORREST | } |
| <i>against</i> | |
| EDWIN FORREST. | |

On reading and filing consent of Van Buren & Burnham, it is ordered that Hamilton W. Robinson
 3460 be, and he is hereby substituted in the place and stead of Van Buren & Burnham, as attorneys for the defendant, in the above-entitled action.

NEW YORK SUPERIOR COURT.

CATHARINE N. FORREST
against
 EDWIN FORREST.

*Case as settled
 by Justice Mon-
 crief.*

This action was brought to a further trial before the Court, on the prayer of the plaintiff for a further decree, order or judgment of this Court, pursuant to the statute, 3461 compelling the defendant to provide a suitable allowance to the plaintiff for her support, on the 23d day of February, 1860, before the Honorable James Moncrief, one of the justices of this Court, at a Special Term thereof.

The plaintiff's counsel produced and read to the Court the record of a judgment of this Court in this action, entered on the thirty-first day of January, one thousand eight hundred and fifty-two, and also an order of this Court thereafter made in this action, at General Term, on the twenty-fourth day of July, one thousand eight hundred and fifty-six, and two certain orders of 3462 this Court, respectively made at a Special Term thereof, on the twenty-second day of July, one thousand eight hundred and fifty-nine, and on the thirty-first day of December, one thousand eight hundred and fifty-nine, and also the report of Alvin C. Bradley, Esq., Referee, dated December 1st, 1859, with the testimony thereto attached, and the finding and opinion of said Referee, and said Counsel for the plaintiff moved the Court for the confirmation of said report, of which said orders of the General and Special Terms, testimony, findings, opinion and exceptions, copies are contained in the judgment-roll of the decree, order or judgment for such allowance, entered on the foot of the said former judg- 3463 ment of this Court, and hereto attached.

The defendant's counsel objected to said report being

received and taken as evidence, or being used by the Court as the basis whereon to render any final judgment in this action, or to take any action whatever therein, on the ground that the General Term had no authority to make the order of reference under which Mr. Bradley acted, but should have ordered a new trial, or sent the case to the Special Term for disposition, as to the ques-
 3164 tion of alimony. The Court overruled the objection and received the report, and to such action and decision of the Court the defendant duly excepted.

It was then shown to the Court, by the defendant's counsel, that the aforesaid report was filed by the plaintiff's attorneys on the 10th day of December, 1859; that afterwards and on the 19th day of December, 1859, the defendant's attorneys duly filed and served exceptions to said report; that an order was made and entered on January 6th, 1860, a copy of which is contained in the said judgment-roll hereto attached.

3165 That on the 20th day of January, 1860, the defendant's attorneys made and served a proposed case, to have the said report and the action of the said Referee reviewed in this Court; that on the 30th day of January, 1860, the plaintiff's attorney served on defendant's attorneys proposed amendments to such case; that thereupon notice was given by defendant's attorneys to the plaintiff's attorneys of the settlement of such case and amendments, on the 14th day of February, 1860, before the said Referee, at his office at 12 M., of that day; that at the hour and place thus named, the parties to this action severally appeared by their counsel, and
 3166 the plaintiff's counsel objected that the Referee had no power or right to settle such case or amendments, or take any further action in the premises, on the ground that the rules and practice of this Court did not require or allow any such proceeding in the premises; that the Referee sustained such objection; that to his decision in

this behalf the defendant's counsel, at the time of such decision and before said Referee, did orally state that he excepted; the following is a copy of said certificate of the Referee:—"Superior Court, Catharine N. Forrest against Edwin Forrest, New York, 17th February, 1860. To-day, John Van Buren, Esq., as counsel for the defendant, presented a proposed case, containing 3467 exceptions to the report of the Referee in this cause, bearing date the first of December last, and the proposed amendments on the part of the plaintiff thereto, together with the order of this Court herein entered, on the 6th day of January, 1860, and desired the subscriber, as Referee, to settle the same. Nelson Chase, as counsel for the plaintiff, objected that the power and authority of the subscriber under the order of the Court, under which the said report was made, had expired, and that the subscriber had no longer any jurisdiction in the matter. Being of this opinion, the subscriber declined to act.

A. C. BRADLEY." 3468

On the facts thus shown, the defendant's counsel insisted that the cause was not in readiness for final hearing, or for any proceeding whatever therein, but the said justice overruled such objection and ordered the hearing of said cause to proceed, and the defendant's counsel duly excepted. The defendant's counsel then claimed the right to open and close the argument, in virtue of his representing the party who excepted to the report, and the hearing being on such exception as well as on the report. But the said justice refused such leave and decided that on the said hearing the plaintiff's counsel had the right to open and close, and to such decision and ruling the defendant's counsel then and there 3469 duly excepted.

It was then admitted by the plaintiff's counsel, at the request of the defendant's counsel, that since the com-

mencement of this action, the defendant, under the orders of this Court, hereinbefore specified, had, at the dates hereafter specified, paid to the plaintiff the several sums hereinafter detailed :

| | | | |
|------|---------------|-------------|------------|
| | 1859, August | 10th, | \$1,500 00 |
| | " " | 1st, | 200 00 |
| | " September | 5th, | 200 00 |
| | " October | 3d, | 200 00 |
| | " November | 7th, | 200 00 |
| 3470 | " December | 5th, | 200 00 |
| | 1860, January | 2d, | 200 00 |
| | " February | 6th, | 250 00 |
| | " March | 5th, | 250 00 |
| | | | <hr/> |
| | | | \$3,200 00 |

On the hearing, the defendant's counsel referred to and read to the Court the bill of exceptions, signed and sealed in this action after the trial by His Honor Chief Justice Oakley, on the 31st day of January, 1852; also the order of this Court, dated December 31st, 1859, awarding the plaintiff, as alimony, the sum of \$250 per month; also the order of this Court in this action, dated on the 31st day of December, 1859, giving defendant
 3471 twenty days further time to make a case; also the order of this Court, made at a Special Term on the 25th day of June, 1859, denying the motion made by the defendant for a commission to examine witnesses in California, and the affidavits and papers on which the same was made and opposed, and the order of the General Term of this Court, made on the 30th day of August, 1859, affirming the last-mentioned order at Special Term, and also the aforesaid exceptions taken by the defendant to the report of said Referee, all of which are contained in said judgment-roll.

The defendant's counsel then claimed the right to
 3472 open and close the argument, in virtue of his represent-

ing the party who excepted to the report, and the hearing being on such exception as well as on the report; but the said justice refused such leave, and decided that on the said hearing the plaintiff's counsel had the right to open and close, and to such decision and ruling the defendant's counsel then and there duly excepted.

The counsel for the plaintiff was then heard in support of the aforesaid prayer of the said plaintiff, and in favor of confirming the report and overruling the aforesaid exceptions filed to the same, and the counsel for 3473 the defendant in opposition to the confirmation of such report and in support of said exceptions.

The counsel for the defendant thereupon further claimed and insisted before said justice :

First. That the allowance to plaintiff, so far as it is predicated upon the value of the defendant's estate, should be based upon the estimated value of the property of the defendant, as it existed at the time of the commencement of this suit ; or,

Second. That such allowance should be based upon the estimated value of defendant's property as it existed at the date of the order of judgment of divorce. 3474

Third. That the allowance to plaintiff for alimony, so far as it is regulated by the extent of defendant's property, should be based upon its income, and not upon its gross value.

Fourth. That the Court should not base such allowance upon the increase of defendant's estate, subsequent to the commencement of this action.

Fifth. That the Court should not base such allowance upon the increase of defendant's estate, subsequent to the date of the judgment or order of divorce.

Sixth. That, in estimating defendant's property, re- 3475

gard should be had to the diminished value thereof, in consequence of plaintiff's inchoate right of dower.

Seventh. That the allowance for alimony should not commence prior to the confirmation of the Referee's report.

Eighth. That such allowance should not commence prior to the date of the order or judgment for divorce.

Ninth. That in making such allowance, the Court
3476 should take into account the income of the plaintiff, and her means of earning a livelihood.

Tenth. That the Referee erred in rejecting the offer of evidence to show habitual extravagance of the plaintiff in expending money for her personal purposes.

Eleventh. That the Referee erred in excluding testimony tending to show the general character of the plaintiff for chastity.

Twelfth. That the Referee erred in rejecting the offer of evidence to show habitual intemperance of the plaintiff.

Thirteenth. That the Referee erred in rejecting the
3477 offer of evidence to show sexual intercourse between the plaintiff and George Vanderhoff, subsequently to the grant of the divorce in this action.

Fourteenth. That the Referee erred in rejecting the offer of evidence to show the associations of plaintiff.

Fifteenth. That the Referee erred in excluding testimony tending to show the station of plaintiff in society.

Sixteenth. That any allowance to be made to the plaintiff should be limited to such sum as would furnish her a reasonable support, having regard to such situation in life, and the expenses which properly attend her situation.

8478 *Seventeenth.* That the sums voluntarily paid by defend-

ant to plaintiff, since the commencement of this suit, should be deducted from the amount awarded as alimony.

And the said justice, having deliberated on the said matters, rendered his decision, ordering the said report to be in all things confirmed, except that the sums received by plaintiff, as heretofore mentioned, under the several orders of the Court, should be deducted from the amount to be allowed said plaintiff under said report. And the said defendant excepted to the decision of said 3479 justice, ordering said report to be confirmed in manner aforesaid, and the said justice directed a judgment to be entered in said action conformably to said decision, to which direction the defendant's counsel duly excepted.

The counsel for the defendant then and there requested the Court to make and state findings of fact and conclusions of law; the Court declined so to do, and the counsel for the defendant excepted to such refusal and decision.

NEW YORK SUPERIOR COURT.

CATHARINE N. FORREST

against

EDWIN FORREST.

3480

Gentlemen: Take notice, that Edwin Forrest, the defendant above named, appeals to the General Term of this Court, from the judgment entered in this action at

Special Term, on the 2d day of June, A. D. 1860, and
from each and every portion of such judgment.

Dated New York, June 4th, 1860.

Yours, &c.,

H. W. ROBINSON,

Def't's Att'y.

HOWLAND & CHASE, Esqrs.,

3481

Plff's Attys.

GEORGE T. MAXWELL, Esq.,

Clerk.

NEW YORK SUPERIOR COURT.

| | |
|--|---|
| CATHARINE N. FORREST,
Plaintiff and Respondent,
<i>against</i>
EDWIN FORREST,
Defendant and Appellant. | } |
|--|---|

GENERAL TERM—January 7th, 1856.

Present—WOODRUFF & BOSWORTH, JJ.

MR. O'CONOR, *for Plaintiff*—MR. VAN BUREN, *for De-* 3496
fendant.

BY THE COURT:

The defendant appeals from the whole and the plaintiff from a part of the judgment. The points presented by the defendant's appeal will be first considered. The latter appeal presents only questions of law. No motion is made to set aside the verdict as being contrary to evidence. The defendant's printed points, being twenty-seven in number, will be considered in their order.

DEFENDANT'S FIRST POINT.

The point first made is that the Superior Court of the city of New York has no jurisdiction in actions for 3497 divorce.

It is a sufficient answer to this point to say, that if the proceeding to obtain a divorce is an *action* within the meaning of that word, as used in the Code, there can be no doubt that this Court has jurisdiction.

Section thirty-three of the Code declares that the jurisdiction of this Court shall extend to the actions enumerated in § 123 and § 124, in certain cases (the action for a divorce is not enumerated in those sections); to all other actions, where all the defendants shall re-

side, or are personally served with the summons, within the city and county of New York. The defendant resided 3498 and was served with the summons within that city.

"An action," as defined by the Code, "is an ordinary proceeding in a court of justice, by which a party prosecutes another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Code, § 2. Every other remedy is a special proceeding, and all remedies in the courts of justice are divided into "actions" and "special proceedings." Code, §§ 1 and 3.

This proceeding is one to redress a wrong, and to enforce a right consequent upon it. It is conducted as all other remedies by action are pursued—by summons and 3499 complaint. It is called an *action* in the Code, and there are provisions in the Code relative to proceedings to be had in it. Code, § 135, and Sub. 5, and § 253.

By whatever tribunal proceedings of this nature are considered in England, we think that in this State, by long and well-settled practice, and the legislation had on the subject, they are to be deemed within the jurisdiction of Courts of Equity as much as before the recent Constitution was adopted; and that the Legislature is competent to confer on this Court jurisdiction of such an action, there can be no doubt. Cons., Art. 6, § 5 and § 14, and Art. 14, § 12, and Cons. of 1821, Art. 5, and 3500 § 5, and Art. 7, § 2.

The Legislature was competent to vest, and by unequivocal language has vested in this Court jurisdiction of this action against any person resident and served with summons in the city of New York, when the plaintiff is also a resident of the State.

DEFENDANT'S SECOND POINT.

"The plaintiff was improperly permitted to read on the trial a copy of what purported to be a petition of

the defendant to the Legislature of Pennsylvania, without proof that the paper from which it was copied was 3501 an original signed by him."

When this paper was first offered in evidence, the defendant's counsel objected, on the ground that it was only a copy, and that the absence of the original was not sufficiently accounted for, and that objection was then sustained. When it was afterwards received, the defendant's counsel renewed his objection thereto, and excepted to the decision admitting it.

This paper had been prepared and served on the plaintiff, by the defendant's direction, with a notice that the petition would be presented to the Legislature of the State of Pennsylvania, at Harrisburgh, on the 21st 3502 of February, 1850. The petition appeared to have been sworn to on the 16th, and the notice was dated on the 19th of that month. The person who served it swore that he had no doubt he compared it with the original sent to Harrisburgh, although he had no distinct recollection of so comparing it or of seeing the original.

It was proved that, on a search, made in the office of the Clerk of the House of Representatives, a paper, purporting to be a petition of the defendant, verified the 10th of February, 1850, with a notice, dated the 19th of that month, of presenting it on the 21st, with an affi- 3503 davit of service of a copy of the petition and notice on the plaintiff, by Wm. Ellery Sedgwick, was filed on the latter date by the Clerk.

No other petition, or copy of a petition, was found among the papers in the office of such Clerk, or in the office of the Clerk of the Senate. That paper read in all respects like the one admitted in evidence. Notice had been given to the defendant to produce the original on the trial, if it was in his possession or control. The paper read in evidence was properly admitted. 3504 Search was made in the proper places for the original.

It was made at the places where search should have been made, if the paper was used, as the defendant notified the plaintiff it would be. It could not be found, unless the paper actually found was the original petition. The paper read is proved to be an exact copy of the one so found.

The specific objection being, that the absence of the original was not sufficiently accounted for, and all the search having been made which reasonable diligence required, the paper was properly admitted as a copy.

3505 The testimony showed distinctly that the original was given to the defendant, to be carried to Harrisburgh, where the Pennsylvania Legislature was in session at the time. If he carried it, and delivered it according to the direction given to him, then proper search was made, and the evidence was clearly sufficient to show "*prima facie*" that the paper found was the one so carried by him, and delivered. If he did not carry and deliver it, then, presumptively, it still remained in his possession, and secondary evidence was proper.

DEFENDANT'S THIRD POINT.

The question asked of the witness, Christiana Under-
3506 wood, "what was the private business on which she
"went to Mr. Lawson's office, was improperly allowed.
"It was irrelevant and immaterial. The plaintiff's
"counsel did not undertake to suggest any intention to
"render it material by the production of other evidence."

The objection taken at the trial, to the question, was, that it was "irrelevant and incompetent." No objection was made that the answer would tend to degrade the witness, nor did the witness, so far as the case discloses what transpired, suggest that a truthful answer could tend to such a result. The witness was an important one for the plaintiff, and the testimony she had given
3507 justified a full and free cross-examination.

The credit of a witness in the cause in which he is testifying, as contradistinguished from his general credibility, is always affected by evidence of great partiality for the party calling him, and by evidence of officious acts, in inciting or aiding the action or prosecution.

Such evidence is commonly elicited by a cross-examination ; and to what extent a cross-examination should be allowed, for such a purpose, sometimes becomes a nice and difficult question, resting to some extent in the discretion of the Judge at the trial.

And although her first answer to the question was, 3503 that she went to ask Mr. Lawson's opinion if it was proper for her son's boss to send him out so much, yet her further testimony as to what she said to Mr. Lawson about the plaintiff (Lawson being known to her as the intimate friend of defendant, and the reasons assigned for then making the disclosures which she said she did make, in connection with other testimony given by her), may have satisfied the jury that the whole purpose of her visit was to give the information she communicated, and that she was not induced to give it merely to satisfy her conscience.

Judging of the relevancy of the question by the evi- 3509 dence elicited, it was not irrelevant. It was pertinent to the condition of her feelings towards the parties, and may have induced the jury to believe that she was officious in communicating charges which she had not previously considered it a duty to make, and charges of misconduct, too, which, at the time it occurred, did not so affect her sense of propriety as to induce her to leave the plaintiff's house for employment elsewhere, or to inform the defendant of it. Nearly, if not quite, a year had elapsed, after the plaintiff and defendant separated, before the communication was made to Mr. Lawson.

Besides this, the defendant was not bound to take her 3510 previous answer as true. He had a right to know how

far what she thought proper to say was, in her opinion, private business of her own, was in truth connected with the matters now in controversy, and what agency she had in originating or communicating charges affecting the plaintiff, and no undue latitude was given to a cross-examination in permitting the inquiry.

DEFENDANT'S FOURTH POINT.

3511 “ The Court erred in allowing the question to be put
 “ to the witness Anna Flowers, relating to the birth or
 “ parentage of her child. The testimony was immate-
 “ rial and irrelevant, except so far as it tended to impair
 “ the credibility of the witness, by showing the commis-
 “ sion of a specific immoral act. The question tended
 “ to degrade the witness, and the Judge erred in refusing
 “ to instruct the witness that she was not bound to
 “ answer.”

The question objected to was this : “ You have mentioned about your first child ; when was that child born, and who was its father ?”

3512 This question was put on a cross-examination of the
 witness. On her direct examination, she had voluntarily testified that she went to live with the plaintiff in May, 1844 ; that she remained there until the following April ; that she was about fifteen years old in August or September, 1844 ; that the plaintiff, on leaving for Europe in December, 1844, or January, 1845, gave to the witness thirty dollars and some baby clothes ; and to a conversation between herself and the plaintiff, which, unexplained, would warrant the inference that the witness was delivered of a child not long after she left the plaintiff's house ; that Captain Howard was the father of it ; and that the plaintiff was at least aware
 3513 that this intercourse had taken place between the witness and the person named. On her cross-examination, before this question was put, she had testified that she

was married on the 23d of January, 1847, to Mr. Flowers; that she was in this city in 1846, having then returned to it from New Orleans; that her first child had been then born, and was still alive; and that she had not seen it in two years.

Hence, it appears that when the question objected to was put, the witness had voluntarily disclosed the fact that she had an illegitimate child before she was married—that she was got with child when about fifteen years old; and she had also testified to matters which, if credited, would induce the belief that she was got with child while in the service of the plaintiff, and that Captain Howard was the father of the child. 3514

It is difficult to perceive how it could tend to degrade her, after having testified to so much, to state the precise day on which the child was born, and the name of the father. If the tendency of the question to call for an answer which might degrade her, or which might aggravate the degradation already confessed, is to be determined by the answer given, the soundness of the objection taken does not become more apparent. 3515
Whether the child was born one or two years before her marriage was immaterial, so far as it affected the question of her degradation; and swearing expressly that Captain Howard was the father of the child was but an unqualified declaration of a fact clearly intimated by her direct examination.

The objection was not taken by the witness. At most, it was a matter of personal privilege; and if she did not see fit to decline answering, on the ground that an answer to it would tend to degrade her, the defendant could not exclude an answer merely on that ground. 3516

Such an objection, when it can be taken at all, must be taken *in limine*, by the witness. The witness has no privilege, after voluntarily testifying, on a direct examination, to matters which tend to degrade her, or to impair

her general credibility, or her credibility in the particular cause, which will exempt her from a cross-examination in respect to the same matters, on the naked ground that such cross-examination will tend to degrade her.

Nor did the objection to the materiality of the question rest upon any better foundation. The testimony
 3517 of the witness, in relation to this her first and illegitimate child, had been called out by the defendant himself; that testimony tended to show, not only that Captain Howard (with whom the recriminatory charges of adultery, by the plaintiff, connected her) was the father of the child, but also that the plaintiff was cognizant of the witness's misconduct with him; indeed (as the witness expressed it), that she (the plaintiff) "was her ruin," and had been actually concerned in providing for the child itself, and had violated her promises in this matter; and not only so, but that, with knowledge of the facts, she (the plaintiff) was party to the scheme for concealing the circumstances from her husband (the defendant), and endeavored to prevent the witness from
 3518 disclosing it to him. Thus, circumstances of suspicion, involving the plaintiff in complicity with her alleged paramour in a matter disgraceful to herself, and tending to show her depraved sense in regard to the unchaste and libidinous conduct of the witness and a visitor at her house, were most clearly a proper subject for inquiry and explanation by the plaintiff, after the *defendant* had thought proper to open the inquiry.

DEFENDANT'S FIFTH POINT.

"The Court erred in refusing to allow the defendant
 "to show the dissolute and libidinous conduct of the
 3519 "plaintiff (mentioned in the offer, folios 553, 554), and
 "in deciding that evidence of misconduct of the plaintiff, with other men than those with whom she was
 "charged with adultery, was inadmissible."

"They were proximate acts, tending to show the
 "adultery charged."

The offer referred to was as follows, viz. :

“ Defendant’s counsel offered to show that at the
 “ time Mrs. Forrest was residing in Sixteenth street her
 “ house was visited by gentlemen without their wives ;
 “ that they were furnished entertainment, and that there
 “ was drinking and disorder ; that most unseasonable
 “ hours were kept, and that gentlemen under these cir- 3520
 “ cumstances were received separately, and invited to the
 “ separate rooms of the ladies living at the house. Plain-
 “ tiff’s counsel objected to such testimony. The Court
 “ sustained the objection, and held that evidence of mis-
 “ conduct on the part of the plaintiff, with other men
 “ than those with whom she was charged in the answer
 “ with having committed adultery, was inadmissible. To
 “ such decision, and every part thereof, defendant’s coun-
 “ sel excepted.”

The adulterous intercourse, set forth in the recrimina-
 tory charges made by the answer, named all the persons
 with whom it was alleged to have been had. The an- 3521
 swer did not aver that the plaintiff had committed adul-
 tery with any person whose name was unknown to the
 defendant. No evidence of adulterous intercourse with
 any persons, other than those with whom the answer
 charged it to have been committed, was admissible.
 The exclusion of the evidence offered to be given did not
 deny to the defendant a right to prove the circumstances
 of any interview between the plaintiff and either of
 those persons, at that house, or the general or particu-
 lar demeanor of the plaintiff and either of them towards
 each other.

The offer did not contain a proposition to prove that the 3522
 plaintiff had been guilty of improper conduct with either
 of them at that house, or a general course or specific in-
 stance of lewd conduct ; or that it was a house to which
 gentlemen resorted, to keep appointments, which never
 should have been made ; or to gratify passions which
 should be mortified, instead of being indulged.

That gentlemen eat and drank at the house, or staid until a very late hour, or that those calling to see some of the ladies were invited to the rooms of the lady
 3523 whom they called to see, is not of itself immoral, although such conduct may be at variance with the views of the most moral portion of the community, in respect to dignified and refined social intercourse. If such general facts, as were thus offered to be proved, would tend to establish the fact of adultery between the plaintiff and any one gentleman who visited the house, it is difficult to see why they would not as much tend to prove that she had committed it with all of them.

Considering the known difference of the fashions and habits which obtain among different classes of society, that the visits and entertainments of some commence
 3524 after an hour at which others, perhaps no more moral, think that all honest people should be in their own beds, in their own dwellings, such evidence as that offered and rejected should not be admitted, as tending to prove that plaintiff had committed adultery at that house or elsewhere with any of the gentlemen who visited it.

It may be true that some, and perhaps most men, would think a lady more likely to be guilty of adulterous intercourse, who would admit a gentleman to her separate room, than one who would refuse to see a gentleman, unless it was in a public parlor and in the presence of witnesses.
 3525

But when there is nothing against the character of a house, beyond the general facts offered to be proved in this case, such facts should not be admitted as evidence, either of itself tending to prove adultery with any of the persons named in the pleadings, or that the general habits of the plaintiff were lewd, or as supporting the damaged or discredited testimony of witnesses swearing to time and place when the offense was actually committed.

DEFENDANT'S SIXTH POINT.

"The Court erred in allowing the question to the witness, James Lawson, whether Mrs. Underwood, at an interview, which he testified he had with her, at his office, on the first day of February, 1850, then first communicated to him any thing respecting Mrs. Forrest." 3526

James Lawson, a witness for the defendant, on his cross-examination, said: "I had an interview with Mrs. Underwood, on the first day of February, 1850, at my office; I did not expect that interview."

The plaintiff's counsel then asked him this question:

"Was it then she made her first communication respecting Mrs. Forrest? The defendant's counsel objected to this question as relating to a collateral matter called out on her cross-examination, but the Court was of opinion that Mrs. Underwood's statements in reference to this interview were not strictly a cross-examination—to which opinion and decision defendant's counsel excepted." 3527

The question, it will be observed, was merely to the point, whether Mrs. Underwood, on the 1st of February, 1850, for the first time made to him her communications respecting Mrs. Forrest. The question did not call for a statement of what she said, nor was such a statement elicited during her cross-examination. The time when this communication was made, assuming it to have been in terms such as Mrs. Underwood testified, was relevant and might be material in more than one aspect. If the answer had disclosed that this communication was made at an earlier day, and before the letter was written by the witness to the plaintiff's father, or before some of the letters written by him to the plaintiff, it would justly have affected his credibility in this particular case. That the letters written by him to the plaintiff had not then been read in evidence, is of no consequence, in con- 3528

sidering the pertinency of the question, in this aspect of the case. Whether his answer would contradict Mrs. Underwood, was in this view wholly immaterial.

3529 The date of this interview, as testified to by Mr. Lawson, is substantially the same as that fixed by Mrs. Underwood.

It was competent for the plaintiff to show, if she could, that Mrs. Underwood, at the time she made this communication, had no other business with Mr. Lawson, nor any other avowed purpose in calling upon him, except to make it. It was proper to show, if practicable, that she called purposely and officiously from hostility to the plaintiff, or from the hope of being rewarded by the defendant, to communicate the information she then gave.

3530 It was proper to fix the time of that interview by the testimony of Lawson, so that there might be no doubt that he was speaking of the same interview of which she had testified. The fact, that a party may fail to obtain the expected answer, makes the question none the less proper or relevant.

But the question objected to related merely to the fact, whether, at this interview, Mrs. Underwood first communicated to Mr. Lawson information respecting the misconduct of the plaintiff.

This inquiry was relevant, and not subject to the objection that it related to collateral or immaterial matter, about which Mrs. Underwood had testified; and it 3531 was moreover proper in its bearing upon the theory of the plaintiff, that the charges against the chastity of the latter were not set on foot, or even conceived, until after the defendant's application to the Pennsylvania Legislature had failed of success.

DEFENDANT'S POINTS, SEVEN, EIGHT, and NINE, may be considered together.

Mr. Lawson testified that while the plaintiff was residing in Sixteenth street, he made special efforts to

bring about a reconciliation between her and the defend- 3532
 ant; and it was regarded by him as essential to any
 prospect of success, that she and her sister should cease
 to live together, and that the plaintiff consented to the
 separation. That he received from the plaintiff a note
 addressed to himself, which he enclosed to Mr. Forrest
 the same afternoon he received it, and got it again from
 him the next day.

This letter was offered in evidence by the plaintiff,
 and objected to by the defendant, on the ground of its
 incompetency and irrelevancy. It was allowed to be
 read, and defendant's counsel excepted to the decision
 of the Court.

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This is defendant's 7th Point.

This letter related to the proposed separation between
 plaintiff and her sister, and that it was to take place the
 next Monday. It indicated that Mr. Lawson was not
 attempting a reconciliation at the instance of the plain-
 tiff, and that, in assuming to act as he did, he had some
 reliable ground to suppose that the following of his ad-
 vice would further a good object. The letter having
 been read by Mr. Forrest, he was informed by it that
 his agent and the mutual friend of both parties had
 seriously engaged in efforts to bring about a reconcilia-
 tion, with at least some hope of success, that the plain- 3534
 tiff was acting on the advice of Mr. Lawson with a
 view to such a possible result. Such facts are relevant,
 and the conduct and statements of the defendant to
 Lawson, with reference to that matter, are pertinent and
 competent evidence. This letter, which was written on
 the morning of the fifth of November, 1849, requested
 the favor of a few lines from Mr. Lawson on the follow-
 ing Monday.

On Monday, the 14th, he wrote to the plaintiff a let-
 ter, which related, among other things, to the subject
 matter of reconciliation. He did not know whether 3535

Mr. Forrest saw that letter or not ; it was offered in evidence by the plaintiff, and the defendant objected to its being received, and the Court held " that sufficient " had been shown to prove that Mr. Lawson was negotiating between the parties with Mr. Forrest's knowledge, and overruled the objection : defendant's counsel " excepted to such decision."

This is defendant's 8th Point.

The letter was then read.

The defendant knew that Lawson felt at liberty to
 3536 attempt a reconciliation between him and the plaintiff. He had read a letter from the plaintiff to Lawson on the subject and had not thought proper to direct him to forbear further efforts, and he knew from such letter that the plaintiff expected from Lawson a note advising her of the spirit and views with which he treated the matter. This note was competent to show the character of the intercourse between plaintiff and Lawson in relation to this matter. What he wrote to her in that letter relative to this subject is a fact of some importance in the case, and although there is not such evidence of the defendant's having seen it as to charge him with the fact of having consented that Lawson
 3537 might state that he lived " in good hope " of a successful issue of the enterprise, yet the defendant so far assented to Lawson's continuing his efforts, that the letter should be admitted as a part of a truthful history of the transaction.

To a certain extent he may be regarded as a person authorized to communicate the views of each to the other in respect to a particular matter. What he wrote to the plaintiff in respect to it, while thus acting and while known to the defendant to be thus acting, is not so clearly irrelevant or incompetent that a new trial should be granted on account of the admission of the letter of the 14th of November, 1849, especially when
 3538 the contents of the letter itself are considered.

On the day of the receipt of that letter, the plaintiff replied to it by a note written by her to Mr. Lawson. The plaintiff's counsel offered to read it. "Defendant's counsel objected to the reading of Mrs. Forrest's letter to the witness. The Justice overruled the objection and the defendant's counsel excepted."

This is defendant's 9th Point.

This reply, in substance, stated that she thought, if he had any grounds for saying, "I live in good hope," she had a right to know them. That she hoped he would remember she had not asked him to act as intercessor 3539 between Mr. Forrest and herself, that she had simply agreed to follow his advice, and hoped he would write to her as soon as he had any instructions from Mr. Forrest to communicate.

The letter is so far important as it tends, with the other letters, to show that Lawson as well as herself understood he was acting in the matter on his own suggestion, or, at all events, not at her solicitation, and that Lawson in his communications would state such matters as the defendant might authorize or instruct.

We do not see that the letters, together with the oral testimony of Mr. Lawson in relation to what he did in attempting a reconciliation, are very material, 3540 except so far as they may tend to establish that in November, 1849, the defendant knew Mr. Lawson had undertaken to bring about such a result, assuring the plaintiff of his confidence of ultimate success, and that Mr. Forrest did not treat this volunteer effort of Mr. Lawson as it would be natural he should do, if he believed the plaintiff guilty of conduct which entitled him to a divorce.

We do not think that there was any error in admitting either of the letters in evidence, which makes it the duty of the Court to grant a new trial. 3541

DEFENDANT'S TENTH POINT.

"The Court erred in refusing to allow the defendant to read in evidence the letter (marked exhibit A) addressed to *Consuelo*, at the stage of the proceedings when first offered."

This letter was subsequently admitted and read in evidence by the defendant.

There is nothing in this point, unless it be a sound rule of law, that a ruling rejecting evidence offered, erroneous at the time it was made, cannot be cured by
3542 admitting the same evidence, at the instance of the party excepting, in a subsequent stage of the trial.

The defendant did not stand upon the exception he had taken, but gave other evidence to entitle him to read that letter, and, after he had given it, he was allowed, on his own motion, to read, and did thereupon read it in evidence. No authority has been cited to the effect that for such an error a new trial should be granted.

It is deemed to be well-settled law, that if a defendant moves for a non-suit when the plaintiff rests, which is erroneously denied, yet, if the defendant, although he excepts to the decision, instead of relying upon it, proceeds to give evidence in the cause, and the
3543 plaintiff recovers, a new trial will not be granted for such error, if the whole evidence given is sufficient to uphold the verdict. (2 Wend., 561; 7 ib., 377.)

It seems to us that that case is stronger than the present, in that, if a correct ruling had been made, the defendant would have succeeded in the action—if the ruling, which the defendant insists was the proper one, had been made in this case, and the letter admitted, it by no means follows that the action would have terminated in favor of the defendant.

In that case, the defendant, by not standing upon his exception, loses his right to a new trial. It is difficult

to state a principle which should exempt the omission 3544
to reply, upon the exception in this case, from the same
consequence.

This view is presented upon the assumption that the
ruling by which the letter was excluded, when first
offered, was erroneous. In this view of the question,
we deem it unnecessary to express any opinion whether
it was erroneous or not.

For, conceding that it was, we do not think a new
trial should be granted for that cause, for the reason that
on the defendant's motion the letter was subsequently
read in evidence by him, and before any witness had
been further examined before the jury. 3545

DEFENDANT'S ELEVENTH POINT.

To understand this point and its six subdivisions, it is
necessary to state how the question arose, and the de-
cisions made, which this point brings under review.

In an action pending in the Supreme Court of this
State, brought by the plaintiff against the defendant to
obtain a divorce, an order was made September 2d,
1850, restraining him from further prosecuting a suit
previously brought by him against the plaintiff (to ob-
tain a divorce) in the Court of Common Pleas for the
city and county of Philadelphia, or any other suit for a 3546
divorce, in any State other than New York, and also re-
straining him from doing other specified acts.

The defendant moved in the said Supreme Court, on
his own affidavit, made Nov. 15, 1850, and other papers,
to dissolve that injunction.

It was opposed, among other papers, on an affidavit of
the plaintiff's, made December 20, 1850, also on an affi-
davit made by the plaintiff September 2d, 1850, and
which was affirmed, by the affidavit of December 20th, to
be true, and on the complaint in that suit.

The defendant, after the *Consuelo* letter had been re-

3547 jected, as stated under his 10th Point, apparently for the purpose of furnishing evidence which would establish his right to read that letter, produced the two affidavits of November 15 and December 20th, 1850, and offered "to read in evidence from the said affidavit of "the *defendant* the statements therein contained, as to "the manner in which the bundle of letters therein "mentioned, in which the letter addressed to *Consuelo* "was alleged to have been contained, had been kept by "the plaintiff and discovered by the defendant, and the "genuineness and character of that letter, and the "nature of the intercourse alleged to have taken place 3548 "between the plaintiff and Jamieson after her receipt "of that letter."

This Consuelo letter, so called, was alleged to have been written by *Jamieson* to the plaintiff, to have been retained by her with other letters, which it was averred she carried about her person, and to have been discovered by the defendant, in a private drawer of the plaintiff, on the 18th of January, 1849. It was also insisted that the contents of this letter implied an admission, if they did not affirm the fact, of improper intercourse having taken place between Jamieson and the plaintiff, and that the discovery of this letter was the cause of the 3549 separation.

The plaintiff's counsel objected to any part of that affidavit being read in evidence, and the Court sustained such objection and held that "no part of such affidavit could be read in evidence, unless the defendant's counsel should elect first to read the said affidavit of the plaintiff, and it should appear therefrom that the reading of some parts of the defendant's affidavit were necessary to explain and render intelligible some parts of the affidavit of the plaintiff, so read in evidence; to which decision of the Court, and every part thereof, the defendant's counsel excepted."

3550 The defendant's counsel then read in evidence, from

said affidavit of the plaintiff, parts of it, which admitted the receipt by her of the paper called the Consuelo letter, and which also denied that she carried it about her person, secreted, or that she kept it concealed.

The defendant's counsel thereupon proposed "to read from the defendant's said affidavit the statements therein contained, as to the manner in which he had discovered the said letter addressed to *Consuelo*; plaintiff's counsel objected, and the Court sustained such objection; to which decision defendant's counsel ex- 3551
"cepted.

"And the plaintiff's counsel hereupon claimed that the plaintiff's counsel had a right to read to the jury, or have read by the clerk, other portions of the said affidavit of the plaintiff, or that those portions thereof already read should be stricken out of the case. The Justice so held and decided, and the defendant's counsel excepted to such decision.

"And the defendant's counsel further claimed and insisted that he should not, as a condition to the parts of said affidavit already read by him being retained as evidence in the cause, be obliged to acquiesce in the reading to the jury of any parts of said affidavit of the 3552
"plaintiff, except such as might further explain or qualify some of the portions already read, nor any of those parts of said affidavit of said plaintiff which were irrelevant, but the Court decided otherwise, and held that the parts of said affidavit, which the defendant's counsel had read in evidence, should be excluded from the case, unless he reads or the plaintiff's counsel was permitted to read such other parts thereof as the plaintiff's counsel should require to be read."

The plaintiff's counsel thereupon marked parts of plaintiff's said affidavit which he did *not* desire read to the jury, and "called for and required defendant's coun- 3553

“sel to read in evidence to the jury all the residue of
 “said affidavit; the Justice sustained such requirement;
 “to each and every part of which said decision of the said
 “Justice the defendant’s counsel excepted.”

Defendant’s counsel, under the requirements of the
 said decision, read the residue of the said affidavit, and
 also six of the several parts specified by the plaintiff’s
 counsel as parts which he did not insist should be read.

“And hereupon plaintiff’s counsel claimed and in-
 3554 “sisted that the other affidavit of the plaintiff, made on
 “the second day of September, 1850, having been
 “referred to and reaffirmed in the said affidavit of the
 “plaintiff, of December 20th, 1850, the plaintiff was
 “entitled to read or have read in evidence the said affi-
 “davit of the 2d of September, 1850. The Court
 “concurred with the plaintiff’s counsel, and thereupon
 “the defendant’s counsel also read said affidavit of the
 “plaintiff, of the 2d of September, 1850. To this de-
 “cision defendant’s counsel also excepted.”

The defendant’s counsel, upon such requirements,
 thereupon read said last-mentioned affidavit.

Defendant’s counsel, upon the like requirements of
 3555 the Court, also read the following portion of the com-
 plaint of the said plaintiff in the said suit, pending in
 the Supreme Court, as follows:

“She, the said plaintiff, has, at all times since her said
 “marriage, lived and conducted herself in a chaste and
 “virtuous manner, as the wife of him, the said Edwin
 “Forrest, and has never committed adultery, or been
 “guilty of any unchaste, impure or immodest conduct
 “whatever.” To the requirement that this part of the
 complaint should be read, no exception was taken.

“And, hereupon, the defendant’s counsel again offered
 “to read in evidence the said affidavit of the defendant,
 “for the purpose of explaining the statements in the
 3556 “said affidavit of the plaintiff, on the 20th of December,

" 1850. The plaintiff's counsel objected, and the Court sustained such objection, to which defendant's counsel excepted."

" Defendant's counsel hereupon offered and proposed to read in evidence certain parts of defendant's said affidavit, but the plaintiff's counsel objected, and the Court sustained the objection; to which decision defendant's counsel excepted. And the Justice held that the defendant was only entitled to read such parts of his said affidavit as were necessary to render the statements made by the plaintiff, in her said affidavit of the 3557 20th December, intelligible, and when the same could not be understood without such reference; that the parts offered to be read contained allegations not necessary in order to understand fully the allegations in the plaintiff's affidavit; and he sustained the objection of plaintiff's counsel; to which decision defendant's counsel excepted."

" Defendant's counsel again offered in evidence the said letter addressed to Consuelo, marked Schedule A; plaintiff's counsel objected, but the Court allowed the said letter to be read in evidence, and it was read."

Before the evidence was closed, plaintiff's counsel offered in open court— 3558

First. " That the parts of Mr. Forrest's said affidavit (of Nov. 15, 1850) which are not marked with a pencil, and now shown to the Court, may be read," " not as evidence of the facts therein stated, but as mere statements, for the purpose of making more intelligible the parts of Mr. Forrest's affidavits, made September 2d, and December 20th, 1850."

Second. " That any other part of such affidavit may be, in like manner, read, which the Chief Justice shall deem relevant, and likely to make more intelligible Mrs. Forrest's said affidavits." 3559

Third. "That, in like manner, for the like purpose, "any part of Mr. Forrest's said affidavit which answers "in any way the matters of Mrs. Forrest's affidavit of "September 2d, 1850" (may be read), "beginning with "folio 223 of the printed book on this trial, to and including folio 229 of the same book."

Fourth. "That the defendant's counsel may, in like "manner and for the like purpose, read any part of the "answer to the complaint in the suit for an absolute "divorce in the Supreme Court; and the plaintiff invites
3560 "the counsel for defendant to point out any other "part of the aforesaid affidavit of the defendant which "he supposes ought to be read in manner and for the "purpose aforesaid, intending, if she can concur in such "view of the same, to give her consent that the same "be read; and the defendant's counsel declined to act "upon such offer."

The defendant's 11th *Point* is, that each of the said several decisions is erroneous, and that the aforesaid offer of plaintiff's counsel does not obviate the said errors.

Neither party has a right to read on the trial of a cause an affidavit made by himself, as evidence, in his own
3561 favor, of the truth of the statements it contains.

The fact, that it was answered in the action in which it was made and used, by an affidavit of the other party, does not make it admissible as evidence in his own favor on the trial of another action, to maintain the issues tried in the latter.

Either party has a right to read any affidavit made, or writing signed, by the other, if it contains matters pertinent to the issues.

If a defendant reads, on the trial of an action, part of an affidavit made by the plaintiff in another action, the plaintiff has a right to read, or have the whole of such
3562 affidavit read, which tends to explain, modify, or even

destroy the particular admission or admissions which have been read as evidence against him, from the same affidavit.

May he also read parts of the same affidavit which contain statements in his own favor, upon the general merits of the action, but which have no connection with the matters of the admission contained in those parts of it read against him, as evidence of the truth of such statements ?

Assuming that the plaintiff was entitled to read all portions of her said affidavit, which not only stated the circumstances under which the *Consuelo* letter was received, and the manner in which it had been kept, and why it had not been destroyed, but also those parts of it which denied that she had written to Jamieson after she received it, or her meeting but once afterwards, or that any thing improper in manner or intent had ever occurred between them, was she at liberty to read other parts of her said affidavit, which in no way tended to explain the full and exact meaning of the passages read by the defendant, or to obviate or fully answer the effect that might be produced, or the inferences that might be drawn from such passages, although material and relevant to the issues to be tried ?

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In the *Queen's Case*, 2d Brod. & Bing., 294, certain questions in the course of the proceedings were proposed by the Lords to the Judges.

One of the questions proposed an inquiry as to the extent to which a witness for a plaintiff, who, on cross-examination, stated that, at a time specified, he told one C. D. he was one of the witnesses against B., the defendant, might be re-examined on behalf of the plaintiff as to the conversation with C. D. :—whether, so far only as such conversation at the time specified relating to his being such witness, or whether he could be asked, “as well with respect to such conversation, relating to his

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being one of the witnesses against B., as passed between him and C. D. at the time specified, after he had told him that he was to be one of the witnesses, as with respect to such conversation as passed before he so told him?"

BEST, J., was of opinion that he might, on re-examination, be asked as to all such matters.

The other Judges thought otherwise, and concurred in the conclusions stated by ABBOTT, Ch. J., and in 3566 the reasons stated by him in support of them.

ABBOTT, Ch. J., in delivering his opinion, said: "I think the counsel has a right, upon re-examination, to ask all questions which may be proper, to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness." * * * "And I distinguish between a con- 3567 versation which a *witness* may have had with a *party* to the suit, whether criminal or civil, and a conversation with a *third person*. The conversations of a party to the suit are, in themselves, evidence against him in the suit; and, if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation, and not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the 3568 suit, because it would not be just to take part of a conversation as evidence against a party, without giving to

the party at the same time the benefit of the entire residue of what he said on this occasion.

“But the conversation of a witness with a *third* person is not in itself evidence against any party to the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations and by the motive under which he made them; but when once all which had constituted the motive and inducement, and all which may show the meaning of the words and declarations has been laid before the Court, the Court becomes possessed 3569 of all which can affect the character or credit of the witness, and all beyond this is, in my opinion, irrelevant, and incompetent.”

The rule as here stated allows either party, whose conversations or admissions have been proved by the other, to prove as evidence in his own favor the entire residue of such conversation or admissions, provided only that it is relevant to the issues to be tried. So it also permits a party, whose *witness*, on cross-examination, has testified to conversations between himself and a third person, to prove the entire residue of such conversation, if suited either to explain the sense or meaning of the expressions first testified to, or the motive or inducement of the witness to make them. In other words, as what the witness may have said to a third person is relevant only so far as it may affect his character or credit as a witness, if the party against whom he is called examines him as to any such conversation, the other party may examine him as to all of such conversation as is relevant to the issues, which will include only so much of it as tends to illustrate his meaning in what he said, and his motive in saying it, or the inducement to the conversation. 3570

In *Prince agst. Samo*, 7 Ad. & E., 627, it was decided that a witness, who, on his cross-examination, had testified to statements made by the plaintiff in a particular 3571

conversation, could not for that cause be re-examined as to other statements made by the plaintiff in the same conversation not connected with the statements to which the cross-examination related, although relevant to the issues to be tried.

Lord Denman, Ch. J., in pronouncing the judgment of the Court, expressed the opinion, that the doctrine laid 3572 down by *Abbott, Ch. J.*, in the *Queen's case*, in so far as it was not introduced as an answer to any question proposed by the House of Lords, might be strictly regarded as extra-judicial ; that it was not necessary, as a reason for the answer to the question that was proposed, and that it did not rest on any previous authority. The Court thought that the line was correctly drawn at the trial, and that the reason of the thing required that a re-examination should be confined to such parts of the conversation as related to the same matter, as those to which the witness had testified at the instance of the adverse party.

See *Yates et al., Assignees of Marshall, vs. Carnsew*, 3573 3d C. and P. 99; *Sturge vs. Buchanan*, 10 Ad. and E., 598; *Randall vs. Blackburn*, 5 Taunt., 245.

2 Carr. and P., 569; *Smith vs. Blandy et al., Ryan & Moody*, 257; *Dicas vs. Brougham*, 6 Carr. and P., 249; *Rex vs. Cleeves*, 4 ib., 221; *Rex vs. Higgins*, 3 ib., 603; *Rex vs. Jones*, 2 ib., 629; and see also, *Young vs. Bennett*, 4 Scam. (Ill.), 43; *Sands, &c., vs. Crocker*, 3 Brevard (So. Car.), 40; 17 Pick., 182; 10 N. Hamp., 205; 11 ib., 547; 5 Monroe (Ky.), 94

In this State the decisions are uniform in going to that extent, that if one party prove a single cause of action against the other, by giving evidence of a conver- 3574 sation of such other parties, the latter may prove, that in the residue of such conversation, he stated that such cause of action had been extinguished by payment or release, or that he had a subsisting counterclaim which would affect the amount of the recovery.

3 J. R., 427; 9 id., 141; 10th id., 38 and 365; 11th id., 161; 15 id., 229; 6 Cow., 682; 24 Wend., 350, *Garey vs. Nicholson*; and 2 Hill, 440, *Kelsey vs. Bush*.

In *Garey vs. Nicholson*, the latter sued the former in *trespass* for taking a mare. It was proved by the plaintiff's son, that he took the mare out of the stable by defendant's direction, who was a constable, and claimed 3575 to take it under an attachment in favor of one *Pine*. The defendant's counsel "asked for all the conversation between the defendant and the witness at the time;" on objection, the evidence was excluded, and defendant's counsel excepted. The plaintiff having obtained a verdict, the defendant brought error and the judgment was reversed on another ground, but the Court held that there was no error in refusing to admit the whole conversation.

Of this case it is to be observed, that the report of it does not disclose what the defendant wished or proposed to prove by giving in evidence the rest of the conversation. 3576 There is nothing in the terms of the offer from which it can necessarily be inferred that the residue of the conversation was relevant to the issue. If it was, it was clearly admissible, under the decisions of the Courts in this State, as the cause of action was a single one, and the part of the conversation proved tended to establish it. If the residue of the conversation, if credited, would show that it was discharged, or would justify the apparent trespass, it was admissible unless it would prove facts, which cannot be proved by parole, and inadmissible for that cause alone.

COWEN, J., in giving the opinion of the Court, says, 3577 that the rule which entitles a party, a portion of whose conversation has been proved, to have the whole proved, "must obviously mean that the additional conversation called for should be relevant to the matter in issue. All evidence is received under that qualification; and, if not so restrained, might operate as a waste of time; other

subjects might be introduced having no connection with the subject matter of the suit."

But an opinion was also expressed by Justice Cowen, that the rule must be still further restrained, and that 3578 although the additional matter called for may respect the subject matter of the suit, and make in favor of the party whose declaration is in question, it is not, therefore, always to be received. He cites *Prince vs. Samo*, and *Greene, Exr., vs. Anderson*, 1 Bailey, 358, and concludes by stating that, "even if these cases are questionable, surely the rule never intended to let in a distinct subject, such as the moral character of the parties, or their standing in the neighborhood. The broad terms of the proposition would have gone to that extent." This case does not decide that all parts of the conversation relevant to the issues could not be proved, 3579 because the facts of it, as reported, did not present such a question for adjudication. The opinion agrees to the conclusion that they cannot be, as a matter of course, unless they tend to explain, qualify, or entirely obviate, the effect of the parts first proved, although relevant to other issues to which such parts do not relate.

The cases in this State falling under our observation, and involving the question whether, when part of one party's conversation has been proved by the other, the former may have the whole of it proved, are cases in which the additional conversation either justified the act or showed payment, or a release of the demand, or 3580 a counter-claim growing out of the original transaction forming the subject of the action, which the parts of the conversation first proved tended to establish. It is difficult to perceive why proof, by a party's admission that he had bought specific property, may be met by proof that he stated at the same time that he had paid for it, and yet that, where a plaintiff claiming to have *two distinct* demands against a defendant proves a declaration of the defendant admitting one of them, the de-

defendant may not be allowed to prove that he, in the same conversation and in the same breath, said he had paid the other one. 3581

If the whole residue of the conversation relevant to any of the issues cannot be admitted as a matter of course, but only so much as qualifies, obviates the effect of, or explains the portion first proved, then the rule would seem to be merely this: a party, charged by his admissions in respect to any particular matter, may prove the whole of the admission relative to that matter; his admissions, if broad enough, may be proved, to discharge him from any specific cause of action, which the facts proved by the other party tend to establish. But his declarations are not evidence in his own favor, and cannot be used to establish a defense to a cause of 3582 action, or a cause of action in his own favor, to which the parts of the same declarations proved by his adversary had no relation.

But the questions under consideration do not arise upon decisions at the trial as to the right of a party, whose *conversation* has been proved in part, to have the entire residue of that conversation proved, if relevant to the issues. In this case, instead of proving declarations of the plaintiff, the defendant read part of an affidavit made by her—a document written and single—and the question is, whether she had a right to read such other portions of it as she was permitted to read. 3583

A closer analogy may be thought to exist between this case and answers to a bill in Chancery, when offered in evidence in another action, than between this case and oral conversations which were purely voluntary, when the party was not bound to speak, and silence could not of itself have prejudiced him, or affected his rights or liabilities in respect to any matter then being litigated, or not being then litigated.

We think there is a marked distinction between the effect of an answer which is resorted to, *in the suit in*

which it is interposed, for proof of a particular fact which
 3584 it admits, and of an answer which is introduced in another action, although between the same parties, as evidence in the cause.

Under the practice in Chancery, it depended on the frame of the bill, whether the plaintiff made the answer evidence against him. If the bill merely stated the facts on which the right to relief was based and a prayer for such relief, the answer was not evidence against the plaintiff. The allegations which it denied, the complainant was bound to prove; what it admitted he need not prove, and any new matter set up, it was necessary that the defendant should prove.

3585 If a complainant, in addition to stating the facts on which his right to relief depended, set up various pretenses as a basis for interrogatories, and required the defendant to answer, on oath, various interrogatories contained in the bill, all matters contained in the answer, which were fairly responsive to the interrogatories put, were evidence in favor of the defendant. The complainant having made the defendant *quoad hoc* a witness in the suit, all responsive allegations were evidence against the plaintiff.

This doctrine is discussed at length, by *Chancellor Kent*, in *Hart vs. Ten Eyck*, 2 J. Ch. R., p. 87-93, and
 3586 by *Woodworth, J.*, in the Court for the Correction of Errors, in *Woodcock vs. Bennett*, 1 Cow., 743 and 744, and note A.

In *Hart vs. Ten Eyck*, some of the items on the debit side of the defendant's account were not supported by proof, unless the defendant's answer was to be treated as evidence to establish them. The *Chancellor* disallowed them, holding the answer not to be evidence in support of them. But the Court for the Correction of Errors held, that as the defendant was interrogated by the bill, and required to set forth an account of all just debts

owing by the intestate, and how and in what manner his estate had been applied or disposed of, the charges 3587 contained on the debit side must be allowed, unless disproved or justified by the plaintiff.

Woodworth, J., quotes the language of *Thompson*, J., in *Classon vs. Morris*, 10 J. R., 542, that "the respondents having thought fit to make the appellant a witness, they are bound by what he discloses, unless it is satisfactorily disproved. The answer is not to be discredited, or any presumption indulged against it, on account of its being the answer of a party interested." *Woodworth*, J., adds, "this rule applies to every case where the answer is within the discovery sought."

The Chancellor, however, seems to have entertained the opinion, that if part of an answer was read as evidence 3588 in a court of law, the whole was to be read, and observed that "If an answer is introduced collaterally, and merely by way of evidence in Chancery, it ought to be treated precisely as in a court of law." 2 J. Ch. R., p. 89, 90, 91.

The practical effect of that rule was this: By compelling a defendant to answer interrogatories on oath, all that was said responsively to such interrogatories was evidence against the plaintiff. It did not depend upon his election whether it was to be evidence or not. His own act had made the defendant a witness and compelled him to testify, and all that the defendant had said became evidence if responsive to the interrogatories. 3589 But any thing affirmed which was not responsive to the allegations, although relevant to the issues, as for instance new matter, the defendant must prove. But the plaintiff was at liberty to disprove, if he could, any of the responsive allegations of the defendant.

This rule did not give a party a chance to infringe another well-settled rule, and make his own declarations evidence in his own favor, but, so far as the other side chose to make his declarations evidence, it secured to

him the benefit of all that he had said and chose to say, with reference to the matter upon which he had been
 3590 made to speak, if fairly an answer to any question to which he had been compelled to respond.

With respect to written documents of the one party, a part of which is read by the other, there are decisions to the effect, that the whole is to be read, if relevant to the issues.

In *Lawrence vs. The Ocean Insurance Co.*, 11 J. R. 241, the plaintiff, under an order of the Court, had been compelled to produce sundry letters, relative to the *stay of the vessel* insured at *Gottenburgh*, and also various other letters, concerning *different events* of the voyage, to and from various persons. The defendant's counsel offered
 3591 to read sundry letters from the supercargo to the owner of the vessel, relative to her stay in *Gottenburgh*. The plaintiff's counsel objected, unless the plaintiff was permitted to read all of them. The defendant's counsel insisted that reading from the correspondence, as to a particular point, would not authorize the plaintiff's counsel to read what related to other matters wholly distinct. The Judge overruled the objection, and decided that any of the letters might be read by either party. Id. 245, 246.

Thompson, J., said the production of these letters *under oath* was a proceeding "*analogous* to an answer in Chancery ; and it is an invariable rule, that, where an answer
 3592 "is given in evidence in a court of law, the party is entitled to have the whole of his answer read. It is to be received as *prima facie* evidence of the facts stated in it, open, however, to be rebutted by the opposite party." (Peake's Ev. 35, 37; 4th Esp. N. P. 21.)

Van Ness, J., dissented from the opinion of the Court, that the plaintiff was entitled to judgment, but does not seem to have expressed any dissent as to the point now under consideration,

In *Walden & Walden ag't Sherburne & Eakin*, 15 J. R. 409, the action was for goods sold and delivered, money had and received, money paid, and money lent and advanced. A verdict was taken for the plaintiff, 3593 by consent, for \$5,000, subject to the opinion of the Court, on a case, and the damages were to be increased or diminished as the Court should direct. The defendant, to prove a credit of \$663.37, on the 28th of December, 1811, produced an account rendered by the plaintiffs, which contained various items of credit to the plaintiffs (id. 413). This account contained the whole of the plaintiff's claim, consisting of various items. Their counsel insisted, that the defendants, by producing it in evidence, had furnished evidence of the whole of the plaintiff's claim which would conclude them, unless they disproved the items. Id. 415. 3594

The Court, by *Spencer, J.*, said, "The defendant, *Sherburne*, to gain a deduction from the plaintiff's account, produced the account himself; and, by doing so, he made it evidence. He might, indeed, contradict or disprove it, but, not doing so, it was evidence in the cause to the jury.

If, by reading an item from an account, the whole of it is made evidence for the opposite party, of the credits in it in his own favor, then it is clear that the limitation applied in *Prince vs. Samo* has no application to a written document, whatever should be the rule as to oral conversation. 3595

A plaintiff may prove all of his claim, consisting of several items, except one item. To prove the latter, he reads from an account rendered on paper, signed by the defendant, an admission that such item is a valid claim. If that authorizes the defendant to read the rest of the account or paper as evidence of the items of credit in his own favor, contained in it, it follows that he may thus not only furnish evidence of payment of the particular item which it was read to es-

tablish, but of credits in his favor, which may extinguish all of the several demands against him which
 3596 had been established by other evidence.

This point seems to have been expressly adjudged in *Low vs. Payne*, 4 Coms. 247. *Low* sued *Payne* to recover a balance due upon account. The account consisted of several items, amounting to \$124.26, and the account credited the defendant various sums, amounting to \$100.90. For the balance, \$23.36, he received judgment. On the trial, the plaintiff proved two items, amounting to \$51.65, and made no proof of the other items, except by giving such proof of the plaintiff's books as in view of the Justice made them admissible as evidence. There was no evidence
 3597 of defendant's credits, except that furnished by plaintiff's book. The plaintiff's book contained two charges for cash paid.

The defendant insisted that these two items were not sufficiently proved. The Court said "the defendant
 "made no proof, but would appropriate to himself the
 "benefit of the credits appearing on the same books,
 "while he denies the plaintiff the full benefit of all
 "his charges. The Court below were right in the position held by them, that if the defendant would make
 "the books evidence in his favor, he cannot do so without taking the whole account together. The accounts
 3598 "are received, in that case, in like manner as the oral
 "admissions of the party, the whole of which, or none,
 "must be received; the defendant is concluded by it,
 "unless he wholly disprove the items."

In *Winants vs. Sherman*, 3d Hill, 74, the defendant below offered his books of account in evidence, in order to establish certain matters which he mentioned, under the qualification that they should not be received to prove other matters, to show which, for aught that appeared, they were equally competent. The referees

decided, in effect, that they could not be received with 3599 such a qualification, but must go for what they were worth as evidence generally. This decision was sustained by the Supreme Court.

Kelly vs. Dutch Church of Schenectady, 2 Hill, 105, was an action by a grantee, against his grantor, for the breach of a covenant for quiet enjoyment, on the ground that he had been evicted at the suit of one having a paramount title. On the trial, he put in evidence a bill of exceptions made and settled in the suit against him, declaring, at the time, that his only object was to show by what title he was evicted, and that he introduced it for no other purpose. Held, that notwithstanding his disclaimer, the defendant might use the entire contents of the bill for any purpose pertinent to his defense, viz.: to show the ground of recovery against the grantee, and that it was not under claim of title paramount in fact, but because of the grantee having precluded himself from setting up the grantor's title in that suit. 3600

In *Vibbard vs. Staats*, 3 Hill, 144, it was held that a party who has proved the confessions of his adversary cannot, by afterwards waiving such proof, preclude the latter from proving what further was said by him, on the same subject at the same time, nor could the party 3601 proving them have them stricken from the case without the other's consent.

See *Sizer vs. Burt*, 4 Davis, 426; *Morris vs. Hurst*, 1 Wash. C. C., 433; *Bell et al. vs. Davidson*, 3 Wash. C. C., 328; *Jacobs vs. Farral*, 2 Hawks, 570; *Shaller vs. Brand*, 6 Binn., 435-438; *Dennis vs. Barber*, 6 Sey. and R., 420, 425; *Goss vs. Quirton*, 3 M. and G., 825; *Bessey vs. Windham*, 6 Ad. and E. N. S., 166; *Harrison vs. Turner*, 10 Ad. and E. N. S., 482; *Dagleish, Assignee, vs. Dodd*, 5 Carr. and P., 238; *Richards vs. Frankum*, 9 id., 221. 3602

Viewing the decisions of the Courts of this State as harmonious and explicit in stating the rule applicable to such a case, and in applying it to the cases which have been adjudicated, we cannot hold the decision made at the trial erroneous, without making a decision in conflict with them.

One party, who uses a paper written, or affidavit made
3603 by the other, as evidence, cannot be surprised by the evidence which that other may furnish for himself, if allowed to read the residue of it. The one offering it knows its contents, and it is optional with himself whether he will make his adversary a witness or not.

If either chooses to make what the other has written or sworn to, in relation to the action, evidence in his favor, by reading a part thereof, it is difficult to assign a reason, justified by good faith and fair dealing between man and man, for which any part of the residue of such paper or affidavit, relative to the matter in controversy
3604 in such action, should be excluded.

It must not unfrequently happen that, in reading other parts necessary to explain the full and exact sense and meaning of those first read, passages or expressions may be required to be read which, of themselves, may not be strictly relevant to the case, and may not be capable of affecting, in any way, the conclusions that are to be formed by the Court or jury upon the matters in issue. As to such matters, proper instructions must be given to a jury if they be of a character to call for any instruction from the Court.

3605 As to all such matters which could not be supposed capable, from their nature, of influencing the verdict of a jury, it should not be deemed error for refusing to allow the party, first reading from the affidavit, to contradict them, because such contradictions could not be of the slightest service, and would produce no result except a profitless consumption of time.

The defendant insists that, even if he was bound to submit to the reading of the whole of the plaintiff's affidavit sworn the 20th December, 1850, parts of which he had read on his own behalf, it was nevertheless erroneous to permit the plaintiff's affidavit of the second of September to be also read. The subsequent affidavit of the 20th of December is entitled in the same cause, and, as above suggested, reaffirms the other. The affidavit 3606 of 2d September relates to the same subject; it is again and again referred to in that of 20th December, and by such reference and reaffirmance is as fully adopted, as a part of that affidavit, as it would be had its very language been inserted in the latter.

The full meaning and import of the latter, and the extent of its statements and denials, cannot be understood without reading the other; and a part of the affidavit of December, which the defendant himself read, contained a reference to the other. We think that these circumstances brought both affidavits within the rule above discussed. 3607

In legal acceptation, it is a part of the affidavit of December. See *Tonnele vs. Hall*, 4 Comstock, 143, and cases cited. In the opinion of the Court, showing that when a will refers to another paper in terms that leave no doubts of its identity, such paper makes part of the will.

That such reference is the same as if it were incorporated in the will, and also that it is not material that the one should be annexed to the other, annexation serving no other purpose than to insure identification, and when identified, they make, together, one instrument, though existing in two distinct papers, whether attached 3608 together or not.

As an expression of the sense and meaning of the plaintiff, and of what she intended to say, and did in fact say, by signing and swearing to her affidavit on the 20th of December, the two affidavits are one.

If these affidavits are not to be deemed one document in any other sense, they are, we think, to be taken so far as one admission, that the use of the one of latest date, reaffirming and referring to the other, made them
3609 both evidence in the cause.

In *Layburn vs. Crisp*, 8 Carr. & Payne, it was held, that if a decree of a Court of Equity is put in evidence on a trial at law, either party may put in the depositions upon which it is founded.

In 6 Ib., 437, the defendant, on a trial at law, read in evidence part of a record roll of pleas of the crown, containing several presentments before the justices in Eyre, it appeared that there was one roll for each hundred, but that one part referred to another part: it was held that the whole must be taken as one indictment, and that the plaintiff might have such other parts read as he
3610 thought proper.

In *Goss vs. Quinton*, above referred to, the assignees of a bankrupt having brought trespass, and to prove the defendant guilty of taking the goods in question, produced his examination before the Commissioners in Bankruptcy, it was ruled not only that his cross-examination was evidence, but that an agreement for the purchase of the goods referred to by him on such cross-examination must be considered in evidence also. On a review of the case at Bar, Tindal, Ch. J., held that the examination is an entire thing, and that, if so required, the plaintiffs must have elected to read the whole or
3611 none.

See also *Buller, N. P.*, 238—*Hewett vs. Piggott*, 5 Carr. and Payne, 75; *Yates vs. Carnsew*, 3 ib., 99. The case of *Lawrence vs. Ocean Insurance Company* (11 J. R. 242), above referred to, tends to the same result.

And the cases already cited, showing that when the plaintiff reads part of the defendant's answer in another suit, the defendant may avail himself of it as evidence in

his own favor, upon the ground that "all is evidence, or none," cannot be confined in their application to the mere body of the answer; whatever is annexed thereto, or forms part thereof, is plainly within the rule. 3612

See *Lynch vs. Clarke*, 3 Salk. 154; *Earl of Bath vs. Bathersea*, 5 Mad. 10; *Blount vs. Burrow and Brown*, Ch. C. 75; *Clapp vs. Wilson*, 5 Denio, 285; *Smith vs. Blandy et al.*, 1 Ryan and Moody, 257.

The parts of the defendant's own affidavit, which he offered to read, and which the Judge at the trial excluded, were not necessary to be read to explain any parts of the affidavit of the plaintiff. They would in no wise tend to explain; they consist, mainly, of a denial of the truth of some of the statements read from the plaintiff's affidavit.

The reading of them was refused, on the ground that they contained allegations not necessary to a full understanding of the statements which had been read from the affidavit of the plaintiff. 3613

And if there were any parts of the defendant's affidavit which might have been made more intelligible by any portions of the plaintiff's affidavit (which we do not perceive), the offer made by the plaintiff's counsel, withdrawing all objection to their being read or their being pointed out, seems to us to have satisfied every reasonable requirement. Indeed, the offer went further, and conceded to the defendant liberty to read all such parts of his own affidavit, not only as would explain, but as were an answer to the plaintiff's affidavit of Sept. 2d, 1850.

DEFENDANT'S TWELFTH POINT.

3614

Defendant's counsel offered to read in evidence two letters written to the plaintiff, one by Mr. Voorhies, and one by Mrs. Voorhies: plaintiff's counsel objected to such letters being read in evidence, and the Court sus-

tained the objection: to which the defendant's counsel excepted.

The case does not show that defendant's counsel stated the purpose for which they were offered. His printed Points (Point xii.) assume that these letters are
 3615 "immoral and indecent," and were found by the defendant "with the said Consuelo letter."

They relate, so far as the parts of them having any possible pertinency to this case are concerned, to the marriage between Mr. and Mrs. Voorhies, and justify the inference, perhaps, that their acquaintances did not believe that they had been married at so early a day as they assumed or asserted the fact to be.

If they had not been as discreet before marriage as the proprieties of life required, or as persons would be, whose virtues at all times had a fixed control and supremacy over their passions, there is nothing in either
 3616 letter to justify the inference that the plaintiff had any reason to suspect that any thing improper took place at the time it occurred, and winked at it, or allowed it to continue unproved, in consequence of her own morals possessing so little austerity as not to be shocked by it.

The offer was of the two letters. Unless both should have been admitted, the offer was too broad and the objection was well taken. The answer did not charge that any improper intercourse had been had between Mr. Voorhies and the plaintiff. There is nothing immoral or indecent in his letter; nothing in it, certainly, which would justify the inference that a lady who would receive and retain it was a woman of lewd habits, or easy
 3617 virtue, and thus furnish an item of evidence, to be considered in determining some or any of the several specific issues involving the question of her impurity of conduct with either of the persons with whom it was expressly charged to have occurred.

The rejection of that letter was proper, and the offer, as made, was properly overruled.

There is one expression in the letter of Mrs. Voorhies that may not be a delicate one, under any explanation that can be truthfully given of it. But, on any assumption in respect to the identity of the subject to which it relates, it may not be a matter which should offend any one's sense of propriety, when communicated confidentially by one married sister to another, if the birth of her child may be regarded as the cause which had produced the effect spoken of in her letter. There is certainly nothing in it from which a jury would be authorized to infer, in consequence of the receipt of it by the plaintiff, that the plaintiff was a person of such habits, tastes, or principles, as to render it not improbable that the acts sworn to, by the impeached witnesses who testified to her guilt, occurred, or would be likely to occur, under such circumstances as those which they swore they saw. 3618

DEFENDANT'S THIRTEENTH POINT.

3619

"The Court erred in refusing to allow the defendant to prove material contradictions to plaintiff's affidavit of December 20th, 1850."

"And also in excluding the testimony of Meigham as to the disorderly character of plaintiff's house."

The exceptions which are covered by this Point arise in this wise :

"Defendant's counsel proposed to contradict the statement of Mrs. Forrest, contained in her affidavit of December 20, 1850, that she was not in the habit of giving expensive entertainments, or receiving gentlemen at unseasonable hours. The Justice held the testimony inadmissible, and excluded the same ; to which decision defendant's counsel excepted." 3620

"Defendant's counsel also offered to prove that the witness was woke up on several occasions in the summer of 1850, by disturbances in Mrs. Forrest's house ;

"that he saw numbers of men who were unknown to him coming out after midnight, and that several of them were intoxicated."

Plaintiff's counsel objected, and the Justice excluded the evidence, unless it referred to some of the gentlemen with whom Mrs. Forrest was inculpated by the answer; to which defendant's counsel excepted.

Whether the plaintiff gave any entertainments which, in the judgment of the jury, were expensive, when considered with reference to those given by others, or with reference to her own means, is a fact which of itself should not have had the slightest influence in determining the question whether she had been guilty of any of the specific acts of misconduct imputed to her. There is no principle of law or rule of evidence which makes the expensive character of a person's entertainments any proof of the absence, or weakness, in his case, of any of the cardinal virtues, or of his violating any of the duties of the marriage relation, either on such an occasion, or any other. Whether "gentlemen" were received at an unseasonable hour was not a fact in issue, or one relevant as evidence to any of the issues that were tried.

If by disturbances was merely meant, that the noise was such as to awake Mr. Meigham, without reference to its character, it is not a fact of any consequence. Innocent festivities, when consisting in part of music and dancing, or of the former without the latter, and sometimes without the concurrence of either, are sufficient to awake, on a summer's night, a very sound-sleeping man. We cannot say or perceive that the fact of their occurrence, however unpleasant to the sleeper they awake, is any evidence that any of the participants were guilty, there or elsewhere, of any of the delinquencies imputed to the plaintiff by the answer of the defendant.

It sometimes happens, that gentlemen leave the place of an evening's entertainment intoxicated, without the

fact being any ground of impeaching the sobriety or purity of the person who gave the entertainment. To leave after midnight is not an uncommon occurrence. The ordinary experience of life teaches that, on many occasions which are deemed innocent and proper, it is 3624 more common to leave after than before that hour.

The casual intoxication of a particular individual may be an exceptional incident in a life regular as a whole; it may result from the accidents of hospitality, and have been alike unintentional to the subject and disagreeable to the host, and does not necessarily tend to establish any general or particular fact which could properly strengthen the evidence given by the defendant, in support of any offense imputed to the plaintiff by the answer of the defendant, or weaken that given by the plaintiff, to repel or discredit it, so long as it is not admissible to give evidence of the *fact of actual adultery*, with any person with whom it is not charged to have been committed: the rejection of such evidence, upon an 3625 offer as restricted in its terms as this was, cannot be an error entitling the party offering it to a new trial.

The fact, that the evidence offered would contradict some statements in the parts of the plaintiff's affidavit which were read, does not make its rejection necessarily erroneous.

If any of the portions read could in no aspect of the case be material, and it is entirely clear that they could not have had any effect upon the verdict of the jury, it would be useless to consume time in hearing evidence to contradict them. It was the duty of the Court to instruct the jury properly, in respect to the evidence 3626 furnished by this affidavit, and as no complaint is made concerning the manner in which that duty was performed, we must presume none could be made.

DEFENDANT'S FOURTEENTH POINT.

"The court erred in allowing the plaintiff to contradict Anna Flowers' statement as to her age, when she was committed to the House of Refuge."

On the trial, plaintiff's counsel offered to prove, by 3627 *Charles A. Lee*, "the age of Anna Flowers at the time of her commitment to the House of Refuge, and to fix that period in 1838. The defendant's counsel claimed and insisted that the plaintiff's counsel having called out the testimony of the said Anna Flowers, as to her age at the time of her commitment, on her cross-examination, and such evidence relating to an irrelevant inquiry, the plaintiff could not introduce evidence to contradict her in relation thereto, but the Court overruled such objection, and defendant's counsel excepted to such decision."

A summary of the argument made in support of Point 14 is, that "whether her age, when she went to the House of Refuge in 1838, was 9, as she had stated (fol. 369, 3628 370, 382), or 14 years, was wholly immaterial to the issue, and plaintiff should not have been allowed to contradict her in this particular, being concluded by her answer."

The witness Anna Flowers had testified thus: "I can't remember that I ever lived with Dr. Lee, in Hudson street; I lived with a Doctor, but I can't tell where it was, I was so young; after I left the Doctor, I went to the House of Refuge; I was there a year; my mother made complaint against me, and had me put in."
* * "I heard my mother say I was nine years old when I went to the House of Refuge;" *I was born in 1827*; I don't know at what period of the year; I went to live with Mrs. Forrest in May, 1844;" she testified to what 3629 she said she saw occur between the plaintiff and Captain Howard, in Mr. Forrest's house, and if it be true that she saw what she swore she did, there could be no

reasonable doubt of the plaintiff's guilt. She testified in relation to that transaction thus:

"I was about fifteen years of age then; I remained there until the first of April, of the following year, 1845; it was the latter part of August, or the first of September, that I saw them in bed." 3630

If she was born the last day of the year 1827, she must have been very near seventeen in August, or September, 1844; she was testifying in December, 1851, or January, 1852, to things alleged to have been seen by her in 1844, seven years before that. If she was 13 or 14 years of age in 1838, then she was 19 or 20 in 1844. The fact of her true age was an important one to be known, to enable the jury to judge of her capacity to observe accurately and remember correctly, and whether she had or had not testified in relation to her age, it was a fact proper to be proved in the case.

Whether her age, as proved by Dr. Lee, rendered it more or less probable that her observation and memory could be relied upon, made the evidence none the less 3631 material or relevant.

Whether proof of her true age contradicted her testimony on that point or not, is of no consequence in this view; being a fact proper to be proved, evidence to establish it could not be excluded because it might contradict her own testimony on the same subject.

No objection was made to the answers or testimony given by the witness, as not being properly responsive to the question, or competent to establish the facts sought to be proved by it. The only objection made was, that the plaintiff could not prove her age to be different from what she had testified it to be, when cross-examined to that point, by the plaintiff's counsel. 3632

This objection being untenable, there was no error in the decision excepted to.

DEFENDANT'S FIFTEENTH AND SIXTEENTH POINTS.

Fifteenth.

"The Court erred in allowing the question to Charles A. Lee, as to the general character of the witness in 1838—fourteen years before the trial."

Sixteenth.

3633 "The Court erred in allowing the question to the witness Lee, who only knew her in 1838 for ten days, and had not seen her, or, so far as appears, heard of her since, whether, 'from the degree or extent he had found her character bad,' he would believe her under oath."

On the trial, Doctor Lee testified thus: "I am a physician and teacher of medicine; I knew Anna Dempsey; she lived in my house in 1838, when I lived in Hudson street in this city; I knew her general character in 1838." Being asked, "What was her general character?" defendant's counsel objected to such question as improper, and claimed and insisted that the evidence as to the general character should be as to some recent time, and that the inquiry was to too remote a period; but the 3634 Court overruled the objection, and defendant's counsel excepted. Witness answered, "she was in my family only ten days; I did not know any thing against her character, or I would not have employed her; she told me her age was thirteen or fourteen; at that time, her character was bad." Plaintiff's counsel asked the witness: "From the degree and extent to which you found her character bad, would you believe her under oath?" Defendant's counsel objected to the question as improper, but the Justice overruled the exception, and defendant's counsel excepted. The witness answered, "No, unless her character has materially changed; I have not seen her since."

3635 Although Dr. Lee knew nothing of the character of the witness when he employed her, and although she

was employed by him only ten days, yet he says he informed himself of and knew what her general character was. Unless it was irrelevant evidence which should have been excluded, merely because his testimony related to her general character in 1838, there was no error in the decisions excepted to. That her general character was so bad that, on that account, those who knew her in 1838, and knew what that character then was, would not believe her under oath, cannot be regarded as wholly immaterial. Other witnesses were examined as to her general character at a subsequent period, and down to 3636 so late a time as 1843. That there is any point of time anterior to the trial, after a witness was old enough to have acquired a character, so remote, as to make it error for which a new trial should be granted, that evidence was admitted to prove that her general character then, as well as subsequently, was so bad, that those who knew it would not believe her under oath, is a proposition which is not supported by any authority that has been cited. We think it has no foundation in reason. *The People vs. Abbott*, 10 Wend., 192, 200.

DEFENDANT'S SEVENTEENTH POINT.

"The Court erred in allowing Doctor Hawks to testify as to his opinion of the cause of Miss Clifton's illness in the railroad cars." 3637

The wife of Dr. Hawkes was examined before the question was put to him; she testified as to what she saw, to what Miss Clifton told her while in the cars, and to what Miss Clifton said to Mrs. Hawkes, as to her condition, when they reached Rochester. He was also examined as to what he saw, and testified that he was a physician. Being asked, "From the symptoms you saw before your wife left the saloon, and what you saw afterwards, and, taking into the account the facts, that this lady at the time she reached Rochester was 3638

"in the situation she stated to your wife, that she could not be removed without being wrapped up, did you form an opinion as to the cause?" he answered, "Yes, I did."

Plaintiff's counsel asked the witness what was that opinion?

Defendant's counsel objected to the question, but the objection was overruled by the Court, and the defendant excepted, and the witness answered.

So much of the question objected to as asks for an opinion, based in part upon the fact that she, at the time she reached Rochester, was in the situation she stated to the wife of the Doctor that she was, viz.: "That she could not be removed until she was wrapped up," we understand to refer to a fact proved by Mrs. Hawkes on the trial, and not to some statement of hers to her husband, the truth of which had not been proved as a fact in the case.

He was presumptively a competent person to express an opinion upon the subject to which the question related; on those facts, he formed an opinion as a professional man at the time. We think it was competent as evidence.

3640 If, in giving the answer he made to the question, so far as his opinion was influenced by what he heard from his wife, he can be supposed to mean that he heard from her other matters than those to which she had testified, or than those to which his attention was directed by the question itself, then his answer was not responsive to the question. If it was deemed an irresponsible answer, or that the opinion expressed was formed in part upon other matters than those to which the question related, the answer should have been objected to, and a motion made to expunge it from the evidence in the case.

3641 No such objection was taken, or motion made; the only point arising upon the objection made or exception

taken is, whether the question proposed was a proper one to be answered. We think the judge, before whom the action was tried, decided correctly.

DEFENDANT'S EIGHTEENTH POINT.

"The Court erred in allowing Luther Horton to state his opinion as to the class or character of the house occupied by Caroline Ingersoll."

There was nothing to authorize this testimony as that of an *expert*.

It became important, in the course of the trial, to 3642 prove that this was a house of ill-fame; Luther Horton testified that he was, for over two years, on the police, in the Ward in which this house was situated, and knew there was such a house, and that Caroline Ingersoll lived in it. He was asked, "Had you, when on the police, such opportunity of observation as to enable you to state what class of house it was, when occupied by Mrs. Ingersoll."

Defendant's counsel objected to this question as incompetent and improper. The judge overruled the objection and defendant's counsel excepted. No objection was made or exception taken to the answer of the witness. The only point raised by the exception is, was 3643 the question proper? The question required the simple answer, "I had," or I "had not." It was not one of those matters to which the rule of evidence, which admits the opinions of experts only, is applicable. Any person, who *knew* the fact, was competent to testify in relation to it. The only question was, whether he had such means of ascertaining the fact that he could tell what the character of the house was. It was not only not improper to ask the question, but the fact inquired of him should be known before it would be clearly proper for him to undertake to say what the class or character of the house was. 3644

Whether the house in question was or was not a house of ill-fame, was one purely of fact. Testimony to prove that it was such did not necessarily involve any mere opinion. It was therefore quite proper to ask the witness whether he had such knowledge, or means of knowledge, that he could state what the fact was in regard to the house in question.

DEFENDANT'S NINETEENTH POINT.

“The Court erred in allowing evidence severally,
3645 tending to show Anna Flowers’ want of chastity, previous to the occurrence with Howard, to which she had testified.”

John Dickinson testified on the trial that Anna Flowers came to live with him the last of March, 1840, and left in the following November or December. Plaintiff’s counsel asked the witness: “Did you hear or witness any speech or act of Anna Dempsey, while living with you, indicating that she was an unchaste or lewd person?”

Defendant’s counsel objected to this question as irrelevant and incompetent.

The justice decided to allow any evidence tending to
3646 show Anna Flowers’ want of chastity previous to the occurrence with Howard, to which she had testified, and overruled the objection. The defendant’s counsel excepted to such decision. And under this general ruling, not only the testimony of Dickinson, but testimony bearing the like tendency from Hannah White, James Curson and Barney McCabe was received.

Although the evidence offered, if given, might have the effect to impair the credibility of Anna Flowers with the jury, yet we do not understand it to have been offered, on the theory that it was strictly admissible, as mere impeaching evidence. If admissible on other
3647 ground, it cannot be excluded on the ground that evi-

dence of general reputation of a witness being unchaste, or of particular acts showing her to be so, cannot be proved merely to show that she is unworthy of credit as a witness. *Corning vs. Corning*, 2d Seld., 104; *Bakeman vs. Rose & Wife*, 18 Wend., 146.

It must be borne in mind, that Anna Flowers had testified to facts which she said she saw, and which, if they were truly stated by her, could leave no doubt that the plaintiff had been guilty of improper intercourse with Captain Howard, in August, 1844. That the 3648 plaintiff told her, the next morning after the occurrence, never to mention it. Three nights after this, being the 1st of September, 1844, Anna Flowers herself had intercourse with Howard, in the defendant's house, when the plaintiff and defendant were both absent, and again on the night of the second.

If the testimony was to be credited, it would tend to show, that the plaintiff and Captain Howard, after their own improper intercourse had been discovered, concerted a plan, in pursuance of which Captain Howard was to attempt an intercourse with Anna Flowers, and effect it, whether she should prove willing or unwilling; that the plaintiff left for Philadelphia in the morning, 3649 allowing all the servants leave of absence during that evening, except Anna Flowers, but requiring her to remain in the house; that Howard came in the evening, and carried the plan into execution; that Mrs. Forrest, before her return to her own house, had been told by Captain Howard of the success of the scheme, and that she afterwards promised to Anna to give Captain Howard a good scolding for thus acting with a young girl like Anna.

This evidence, if true, could properly be made to subserve other purposes in the cause, than to establish the fact that the plaintiff had herself been guilty of illicit 3650 intercourse with Howard.

If true, it proved that she had knowledge at the time,

that Howard, whenever it suited his pleasure or convenience, was indulging, in her house, in impure intercourse with one of her domestics, and that, having such knowledge, she retained the one in her service, and welcomed the other to her house as an acceptable visitor. No one can doubt, that such evidence of the plaintiff's lewd disposition and habits would be competent evidence
 3651 in this action against her, even if the answers had not alleged any improper intercourse between herself and Howard.

If Anna Flowers, instead of having been a pure and unsophisticated girl of fifteen, on the first of September, 1844, and then made the victim of a scheme, concerted by the plaintiff and Howard, to silence her from speaking of their acts, or to prevent credit being given to her statements, was, and had been, an unchaste woman, that, about the time of her unwilling and forced intercourse with Howard, she was voluntarily having intercourse with a man-servant of the family, by day and by night, a jury might, in connection with the other evidence
 3652 dence in the case, relating to the same subject, correctly conclude, not merely that there was no improper intercourse between the plaintiff and Howard, but that she was not conscious that any improper intercourse was occurring either between her servants, or between them and any other person.

The evidence, which the Judge at the trial decided to be admissible, was pertinent and competent evidence upon the question, whether the plaintiff was privy to the indecencies practiced in her own house, to which the witness testified, and was the lewd woman which the unrepining head of a family, conscious of such things, and pleasantly allowing them to be repeated, would necessarily be deemed to be, or whether the groundwork
 3653 and details of the evidence thus given (tending to show that the house was but little better than a respectable house of assignation, and was presided over by the plain-

tiff, knowing what was done within it) were mere fabrications !

We think the evidence, in this aspect of the case, was clearly admissible, and so far as it legitimately tended to show the witness unworthy of credit, that result would be the natural effect of evidence, competent in itself, but not offered for the mere purpose of producing such a result. Evidence which is appropriate to establish a 3654 fact material, if proved, may, if credited, operate as an impeachment of some witness who had been examined. Such a consequence does not make it inadmissible, although it might be, if it could serve no purpose except to affect the mere question of the general credibility of a witness.

In another aspect, this evidence was both relevant and material. The witness, upon her direct examination by the defendant, had, in connection with her testimony to the act of adultery between the plaintiff and Captain Howard, represented herself as affected, even unto tears, and, on her cross-examination, as agitated and alarmed by the conduct of the plaintiff and Howard. 3655 The whole drift of her examination in this respect was a representation of herself as a modest child, whose sense of propriety was greatly shocked by what she witnessed. Surely it was competent to show that this representation of herself, made on her direct, as well as cross-examination, was sheer pretense, and that her own habits of life were such as showed her testimony to be untruthful.

DEFENDANT'S TWENTIETH POINT.

The defendant's Twentieth Point, as the Bill of Exceptions now reads, may be dismissed with a mere statement of it : 3656

Mr. *Calcraft*, a witness for the plaintiff, stated, that on leaving the plaintiff's house, on a particular occasion, he went to visit a Mrs. Robinson. Defendant's counsel

asked him, " For what purpose did you visit her on that occasion ?"

The plaintiff's counsel said that he would object to the witness answering, though he were willing to answer. The Judge called upon the defendant's counsel to state the object of the question. The counsel for the defendant stated that his object was, to prove the
 3657 lewd habits of the witness in his associations with other women, at the very time when the illicit commerce is charged to have taken place between the plaintiff and the witness. The counsel for the plaintiff objected to its being received on that ground. The Justice sustained the objection, and defendant's counsel excepted to such decision.

The fact that the witness may have had improper intercourse with some women furnishes no evidence that the plaintiff had any with him. There was no offer to prove that the plaintiff knew or had any reason to suspect that he was a man of lewd habits. That his habits with some woman were lewd, did not tend to prove
 3658 general lewd habits of the plaintiff, or misconduct on her part, on any particular occasion, or with any person named in the answer. And that specific act of immorality on the part of a witness, not connected with the matters in issue, cannot be received in evidence, to impair his credibility, is too well settled to be open to discussion.

DEFENDANT'S TWENTY-FIRST AND TWENTY-SECOND POINTS.

To understand the Twenty-first and Twenty-second
 of the Points made by the defendant, it is sufficient to say, that Catharine Levins, a witness for the plaintiff,
 3659 testified on her direct-examination, that she was a servant in plaintiff's house, and caught Anna Flowers and Barney McCabe, another servant, in bed together, about the time that Anna Flowers testified to having had un-

willing intercourse with Captain Howard. On her cross-examination, she testified that she mentioned this to the plaintiff in October, soon after the plaintiff returned from Philadelphia.

Plaintiff's counsel, on resuming the direct examination, asked the witness :

"What were the words you used to Mrs. Forrest, 3660 when you told her of this affair with Barney?"

Defendant's counsel objected to the question, as irrelevant and immaterial.

The Justice overruled the objection, and the defendant's counsel excepted.

Witness answered, "I told Mrs. Forrest that Anna's conduct was not good, and I did not wish to be in the house with her. I told her I caught Barney in bed with her."

The plaintiff's counsel then asked the witness, "What was Mrs. Forrest's reply?" The defendant's counsel objected to the inquiry as irrelevant and incompetent.

The Justice overruled the objection, and defendant's counsel excepted to the decision.

Witness answered, "Mrs. Forrest said she would have 3661 to turn her away."

These two exceptions constitute defendant's Twenty-first and Twenty-second Points.

If Mrs. Levins told Mrs. Forrest of the conduct imputed to Anna Flowers, immediately after it occurred, that fact was neither immaterial nor unimportant.

To determine what effect the jury should give to the fact of such a communication, in connection with the subsequent conduct of the plaintiff in retaining Anna Flowers in her service, it was proper to show precisely what was told to her. It was therefore proper to know the precise words in which the communication was made, if the witness could state them. Whether the answer was less favorable to the plaintiff than she ex- 3662 pected or desired, does not affect the competency or relevancy of the question.

It was proper, also, to show what was Mrs. Forrest's conduct with reference to the information thus given to her. She may not have believed it, and may honestly have supposed, at the time, that the witness was under a misapprehension. What view she then took of it, and in what manner she treated it, was pertinent matter. Her answer to the communication, given on the instant it was made, was competent and admissible as a part of the transaction, and proper to be considered in determining the effect to be given to the whole transaction, and
 3663 her conduct in reference to it.

DEFENDANT'S TWENTY-THIRD POINT.

"The Court erred in allowing the copy of the letter, annexed to the deposition of John W. Forney, to be read in evidence, as it did not appear that the original was lost, or in whose possession it was, or but that the plaintiff, with ordinary diligence, might obtain it."

Mr. Forney was examined, and testified that he wrote a letter to a Mr. Roberts, by the defendant's authority and with his assent, but was not perfectly certain that defendant saw it before it was sent. He annexed a copy of it to his deposition. Plaintiff's counsel offered to
 3664 read it in evidence.

"Defendant's counsel objected that such paper was not sufficiently identified, and that the original ought to have been produced to witness, or its loss shown, or its absence accounted for."

Plaintiff's counsel then read the deposition of said Roberts, taken in Boston. He testified that he resided in Boston; that he knew Mr. Forney, and did receive from him a letter, containing an allusion to or statement concerning Mrs. Forrest. He further testified thus:

"The letter aforesaid is not in my possession nor under my control, although I suppose I could obtain the
 3665 control of it; I have placed it in the hands of other

parties, and I decline to produce the same to the Commissioners, to be annexed to my deposition ; it contains matter of private concern, not relating to the parties to this suit, which I decline to make public ; it is a private letter—strictly so—and I cannot divulge its contents without the writer's consent."

The plaintiff's counsel thereupon again offered to read the copy in evidence.

"The defendant's counsel renewed his said previous objection to the reading of said paper, annexed to the deposition of John W. Forney (marked A), but the 3666 Justice overruled such objection, and the defendant's counsel excepted, and it was read by the plaintiff's counsel."

If the objection taken to reading the copy is to be understood as meaning that Mr. Forney could not, on commission, be examined as to the contents of the letter he wrote, without having the original before him, or its being first proved that the original was lost, or could not be produced on such examination of Mr. Forney, it is clearly untenable.

The object of proving that he wrote a letter to Roberts by defendant's authority, and the contents of it, was that the plaintiff might be in a position to read the 3667 copy on the trial, on showing *there* that the original was lost, or could not be produced. If the objection cannot be construed as taking any other objection to the reading of the copy than that Forney had not the letter before him when testifying, and that it was not proved, before he testified to the contents of it, that it was lost, or could not be produced, the exception is untenable.

If the defendant cannot be considered as having objected that no such evidence was given, at the trial, of the loss of the letter, or of an inability to produce it, as would authorize a copy of it to be read, then no point is presented for our consideration.

If he may be considered as having taken that objection, then the evidence shows that it was sent into the State of Massachusetts, and continued there, and the party having the control of it refused to annex it to his deposition.

It was not shown that there was any means within the power of the plaintiff by which the production of it could be compelled.

We think the non-production of an original paper is
 3669 sufficiently accounted for, to admit parole evidence of its contents, when it is shown to be in the possession of a party out of the State ; and that all the means which it appears are within the power of the party, to compel its production, have been employed and the person having it peremptorily refuses to produce it, especially when it is not made to appear that, by the laws of the State in which he resides, he can be compelled to surrender the possession of it, that it may be used in the Courts of this State.

United States *vs.* Regburn, 6 Peters, 352 ; Bailey *vs.* Johnson, 9 Cow. 115 ; Rulph *vs.* Brown, 3 Watts & Serg. 395 ; Boyle *vs.* Wiseman, 29 Eng. L. & Eq. R. 473.

3670

DEFENDANT'S TWENTY-FOURTH POINT.

"The Court erred in refusing to allow the defendant to read in evidence the letter of W. C. Bryant."

This was a letter from *Mr. Bryant* to *Mr. Sedgwick*, one of the defendant's counsel. All the authority he testified to having received from Mrs. Forrest was, to appoint an interview to be had at Mr. Sedgwick's office. He did not remember any authority to write the letter. He did not pretend that she had seen it or knew that a letter had been written by him. The Court allowed Mr. Bryant to testify that he appointed an interview,
 3671 but nothing else that he said to Mr. Sedgwick.

He had no authority to write or speak for her, in

reference to the merits of the controversy, or as to her views of them, or her understanding of them, so as to make what he wrote or said in that behalf evidence against her.

DEFENDANT'S TWENTY-FIFTH POINT.

The defendant insists that the Court erred in allowing testimony to be given tending to show the value of the defendant's real estate, and in submitting to the jury the question what amount of alimony ought to be allowed to the plaintiff.

3672

At the close of the evidence relating to the question of the guilt or innocence of the parties, or either of them, the plaintiff "offered and proposed to prove the value of the real estate belonging to the defendant, for the purpose of submitting to the jury the question, as to the amount of alimony to which the plaintiff should be entitled, in case a verdict was found in her favor on the issues now tried."

The defendant's counsel objected to the introduction of any evidence to the jury as to the value of the property of the defendant.

The Court overruled the objection, and the defendant's counsel excepted.

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Thereupon the plaintiff recalled a witness, Thomas Whitely, who gave evidence touching the value of the defendant's real estate, which he described, and the value of the several parcels as estimated by him, amounting in all to from \$144,000 to \$167,000.

Under the provision of the Revised Statutes, when a bill was filed for a divorce on the ground of adultery, if the offense charged be denied, the Court of Chancery was directed unqualifiedly to direct a feigned issue to be made up for the test of the *facts contested* by the pleadings, by a jury of the country. (2 Rev. St. 145, § 39 [40].)

3674

This action was commenced on or about the 10th of November, 1850, and the cause was at issue by the putting in of a reply to the defendant's answer, on or about the 21st day of December, 1850.

At that time the terms of the Code relating to issues, and the mode of trial, declared that an issue of fact in an action for the recovery of money only, or of specific real or personal property (§ 253), must be tried by a jury; and that *every other issue is triable* by the Court (§ 254), which, however, may order the whole issue, or any specific question of fact involved therein, to be tried
 3675 by a jury, &c. By section 72 of the Code, it was also declared that "feigned issues were abolished, and instead thereof, in the cases where the power now exists to order a feigned issue, or when a question of fact, not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial."

It is obvious that, under these provisions of the Code, the only change made by the Legislature in the mode of trial of an action for a divorce, on the ground of adultery, by a jury, was a direction that, instead of a feigned issue, an order for the trial must be made, stating dis-
 3676 tinctly and plainly the questions of fact to be tried.

And these sections of the Code, read in connection with the section of the Revised Statutes above referred to, produce a result, in an action for a divorce, which may be stated thus: "Where the power now exists to order a feigned issue" (Code, § 72), *i. e., if the offense charged be denied* (2 Rev. St. 145, § 39 [40]), "an order must be made" (Code, § 72) "*for the trial of the facts contested by the pleadings.*" (2 Rev. Stat. 181, *supra*.)

The Statute existing before the Code having made a trial of the facts contested by the pleadings before a
 3677 jury a peremptory requirement, it remained so after the Code, substituting an order in the place of the fe-

tion used for that purpose, under the former Chancery Practice.

In this condition of the Statutes upon the subject, the order for the trial of the specific questions of fact contested by the pleadings in the present action was made.

Before those questions were brought to trial, in the Session of 1851, the language of the Code was amended.

This gave rise to the doubt which appears to have influenced the conduct of the present trial.

That doubt seems to have been suggested by the 3678 amended phraseology of § 252 (No. 253 of Code of 1852), in these terms: "An issue of fact in an action * * * for a divorce from the marriage contract, on the ground of adultery, must be tried by a jury."

It is quite clear to our minds that, by the amendment of this section, no change was made in the law regulating the trial of this case, in respect to the question to be tried.

Under the Revised Statutes, and the Code as it stood in 1849 and 1850, the "*facts contested by the pleadings*" were to be tried by a jury in pursuance of an order for such trial, stating plainly and distinctly the questions of fact to be tried. 3679

By the amendment of 1851; "*an issue of fact* in an action for a divorce * * must be tried by a jury"—and by section 259, "*an issue of fact arises upon a material allegation in the complaint, controverted by the answer, or upon new matter in the answer controverted by the reply, or upon new matter in the reply,*" which by § 168 is to be taken as controverted. It need hardly be added, that under this definition, in § 259, an "issue of fact" which is to be tried by the jury is equivalent to the language of the Revised Statutes—"The *facts contested by the Pleadings*" must be tried by a jury.

Whether the phraseology of the 253d [252] section now dispenses with the order stating the questions of 3680 fact to be tried, it is not necessary to say

If the amendment of that section has not dispensed with such an order, then the questions were properly submitted to the jury, under the order made for that purpose. If by such amendment the order is dispensed with, it was nevertheless regular and proper to submit the same questions to the jury to be answered specifically—because the 261st section of the Code, in terms, authorizes the Court, in all cases, to instruct the jury to find upon particular questions of fact stated in writing. Both before and since the amendment of 1851, the ques-
 3681 tions of fact contested by the pleadings, or, which is the same thing, the allegations of one party controverted by the other, are to be tried by a jury, and neither before nor since the Code was it necessary to submit to the jury any other questions.

Recurring to the complaint in this action, it appears that the plaintiff, after setting forth the charges upon which she asserts her title to a divorce, further avers that the defendant is possessed of sundry lands and the improvements thereon, specifically named in the complaint, and also of personal estate of large value, and that the real and personal estates of the defendant are of the value of \$200,000 at the least, and that the clear
 3682 annual income received therefrom by the defendant is not less than six thousand dollars (\$6,000).

Upon the whole complaint, after praying for a dissolution of the marriage contract, the plaintiff also prays that the defendant provide a suitable allowance for her support, and that such judgment for such allowance direct the same to be paid or made out of the property of the defendant, and be made a charge on him upon his real estate within the State of New York.

The defendant, by his answer, after denying the charges of the plaintiff, and setting up recriminatory charges as a ground for his claim to be divorced from the plaintiff,
 3683 avers that "a certain portion of his real property contains only about fifty-four acres, instead of seventy-four,

as charged by the plaintiff, and denies that his real and personal property is worth more than \$150,000, or that his clear yearly income therefrom exceeds (\$4,000) four thousand dollars."

Upon the trial, the presiding judge, instead of submitting to the jury the questions raised by the allegations and denials above stated, (viz., what is the value of the real and personal property of the defendant, and what is the clear yearly income therefrom?) submitted, in addition to the questions which had been previously ordered to be tried, the distinct question: 8th. What 3684 amount of alimony ought to be allowed annually to the said plaintiff?

The objections made by the defendant on the trial, and his exceptions to the ruling of the Court in relation to this subject, were two in number.

First. He objected to the introduction of any evidence to the jury as to the value of the property of the defendant. The Court, nevertheless, received the evidence of the witness, Thomas Whitely, upon that subject.

Second. The defendant's counsel excepted to the submission of the eighth question, above mentioned, to the jury.

In relation to the admission of the evidence, it is to 3685 be noticed that the offer of the evidence was limited to a specific purpose, and it was received for that purpose only, viz., "for the purpose of submitting to the jury the question as to the amount of alimony to which the plaintiff should be entitled, in case a verdict should be found in her favor."

If it was proper to submit that question to the jury, then the evidence was relevant and proper. This is not and cannot be denied.

If that question, in the precise form in which it was put, was not a proper one for the decision of the jury, then the admission of the evidence forms no ground, we 3686 think, for setting aside the verdict, because, confined as

it was to the specific purpose for which it was introduced, it was wholly immaterial and superfluous, as respects any other issue. We can say we think that it could not have had any influence upon the verdict in any other respect.

Before the Code, no issue was formed between the parties upon the question of alimony. The facts constituting the grounds of the claim of the party to a divorce, when denied, and the respective allegations of the parties bearing upon those questions, were the subject of the feigned issue, and to be passed upon by the jury (2 R. S., 145, § 39 [40]); and if, upon the verdict rendered upon those issues, a decree dissolving the marriage contract was pronounced, the Court was authorized to make a *further* decree to provide for the support of the complainant, § 44 [45], and not only for her support, but also to compel the defendant to provide for the maintenance of the children of the marriage, and the allowance is to be such as *the Court* shall deem to be just, having regard to the circumstances of the parties respectively.

Upon an attentive consideration of the subject, we are satisfied that the provisions of the Code have made no alteration in the course of proceeding in this respect, rendering it necessary or proper to submit the question of alimony to the jury.

It was no more their province to determine what further order should be made for the support of the plaintiff, than it would be to decide what order should be made to provide for the maintenance of the children of the marriage, if any there were. These are matters for the determination of the Court. The provisions of section 44 [45], as above stated, and by section 58 [59] of the 5th article (2 R. S., 148), containing general provisions relating to the subject, the Court may, when the wife is complainant, during the pendency of the action or *at its final hearing, or afterwards, as occasion*

may require, make such order, as between the parties for the care, custody and education of the children of the marriage as may seem necessary and proper, and may at any time thereafter annul, vary or modify such order. And by § 59 [60] the Court may require security, or may sequester the defendant's personal 3690 estate, and the rents, &c., of his real estate, and cause them to be applied "towards such maintenance and allowance, as to the Court shall, from time to time, seem just and reasonable."

Under the similar provisions of the Revised Laws of 1813 (vol. 2, p. 198-9, § 64-5, &c.), Chancellor Kent held that it is in the power and discretion of the Court to vary the allowance from time to time, according to the circumstances of the parties, and decreed leave to apply to the Court for that purpose, "as future circumstances may dictate to be just." *Miller vs. Miller*, 6 Johns. Ch. R., 91, 94. So in *Holmes vs. Holmes*, 4 3691 Barb. Sup. Ct. Rep., 295, Mr. Js. Barculo, under similar provisions relating to a divorce *a mensa et thoro*, modified the order directing the husband to provide alimony, making its relinquishment a condition of the order excluding the husband from the proceeds of property subsequently accruing to the wife; and in *Lawrence vs. Lawrence*, 3 Paige, 267 (A. D. 1832), the Chancellor held that the proportion of the husband's property or income which is to be allowed to the wife as alimony, either *pendente lite* or after the termination of the suit, is in the discretion of the Court. The language of the Chancellor, as well as the language of the statute itself, 3692 44 [45] and 53 [54], warrant no distinction, in this respect, between an action for a divorce *a vinculo matrimonii* and a divorce *a mensa et thoro*; and the Chancellor adds, that, in fixing the amount to be allowed, the Court must take into consideration the nature of the husband's means, the situation of the parties in society, the amount of his income, and whether it is from pro-

perty already acquired or from his personal and daily exertions, whether there are or are not children or *other relatives* of the husband, who have claims upon him for
 3693 sustenance, &c., the husband's *ability* to support himself and family, &c.

Neither these circumstances, nor the discretion which was to be exercised thereupon, were the subjects of inquiry under the feigned issue directed by § 39 [40] of the statute. That, by the terms of the statute, related to the offense charged, and by it were tried and determined the facts upon which the right to a dissolution of the marriage contract depended. In practice, the Court, in settling the feigned issues, inserted therein inquiries into the matters set up as a defense, as well as the inquiry into the offense charged in the bill (see Chy. Ct.
 3634 Rules, 168), and added an inquiry into the legitimacy of the issue of the marriage, when that question was distinctly made in the bill of complaint, and which the statute directs shall be determined upon the proofs in the cause: *Cross vs. Cross*, 3 Paige, 140; *Ward vs. Ward*, 2 Paige, 109; *Smith vs. Smith*, 4 Paige, 435 (Rule 169). Nothing in the statute nor the practice of the Court made it the duty of the Court to embrace in the feigned issue the amount of alimony, or the facts upon which it depended. But after the trial of the feigned issue, the cause was brought regularly to a hearing at a stated term of the Court, at which, if a decree
 3695 of divorce was granted, such *further* decree was made in respect to alimony, and the care, custody, &c., of the children, if any, as seemed just in the discretion of the Court—Rule 170; *Daggett vs. Daggett*, 5 Paige, 509; and a reference, for the purpose of ascertaining what was proper, was made if necessary. *Graves vs. Graves*, 2 ib., 62; 2 Barb., Chy. Practice, 259, 260, and cases cited p. 267-8. The case of *Burr vs. Burr*, in 7 Hill, 208, shows that the subject of alimony rests in the *discretion* of the Court in the fullest manner.

As already suggested, the provisions of the Revised Statutes on this subject are unrepealed, and, with the single difference that a feigned issue is no longer proper, the practice under the statute does not appear to us to be changed. The questions to be tried by the jury remain the same; the facts contested by the pleadings before the Code were the material allegations going to the design and object of the bill—to wit, the decree of divorce. The “further decree,” consequent thereon, was then, and is now, for the determination of the Court, under all the circumstances of the case, and the situation of the parties, embracing various facts which formed no subject of allegation in the complaint or answer, and not the subject of consideration at all until it was first determined whether a divorce should or should not be granted. See also Forms of Bills for Divorce, 2 Hoffman, Chy. Prac.; 2 Barb., Chy. Prac.; and other Books of Precedents. 3696

And that the practice on this subject is not altered by the 253 [252] section of the Code, directing that an issue of fact in an action for a divorce shall be tried by a jury, further appears by the rules adopted by the judges of the several Courts in 1852 and 1854 (Rule 70 [71]), which require the cause to be heard at a Special Term after the trial of the issue. 3698

Our conclusion, therefore, is, that the “material allegations” in the *complaint* controverted by the answer (Code, § 250), which constitute an issue of fact to be tried by a jury in an action for a divorce from the marriage contract, on the ground of adultery (Code, 253), are those allegations in the complaint upon which the right to the decree for a divorce depends. These, and these only, are a necessary part of such a complaint. The circumstances which, in a subsequent stage of the proceedings, are to regulate the discretion of the Court in its further decree awarding alimony, are not necessarily nor regularly any part of the issues between the 3699

parties. They are matters which, at a proper time, and in such form as may be thought proper, are to be laid before the Court itself for the guidance of its discretion in a matter with which the jury have nothing to do.

We do not find it necessary to say that the allegations in the present complaint, respecting the amount and value of the defendant's property, and the income therefrom, and the defendant's denials addressed to those subjects, were wholly irrelevant or should have been struck
 3700 out on motion. It has been by some of the decisions under the Code held, that any fact may be stated in the complaint which may affect the ultimate relief to which the plaintiff may be entitled, and even such as may in an equity suit affect the question of costs only. We think, however, that the introduction of such averments, in an action for a divorce, in no way enlarged the issues which the statutes require should be submitted to the jury. They are in no sense the "facts constituting the plaintiff's cause of action" (Code, § 142). They are not facts which the plaintiff must prove in order to maintain her suit, and in our judgment it is the better
 3701 practice not to insert them in the complaint at all. Nor do we find it necessary to say that the Court, under its general authority, to propose questions to the jury (under § 71, or under § 261), have directed the jury to find specially what is the amount and annual value of the defendant's property, with a view to use such finding as one of the elements to be afterwards considered in connection with other circumstances, in determining what the further decree in regard to alimony should award to the plaintiff. We doubt whether in practice that would be deemed the best mode of conducting the trial of the main questions, which, when
 3702 there are recriminatory charges and allegations of condonation, are already sufficiently complicated. When the value and income of the defendant's property are found, there remain other matters to be considered, and

facts to be taken into view, to enable the Court to determine what shall be such further decree, as already above suggested. On this point, it must suffice to say, that no such question was in this case ordered to be tried by the jury, pursuant to § 71, and no such question was submitted by the judge on the trial, under § 261. The comprehensive question, what alimony ought to be allowed to the plaintiff? which the judge did submit to the jury, was a question involving not only an inquiry into the amount and value of the defendant's property, but many other considerations, and we cannot resist the conviction, already expressed, that this question was for the Court and not for the jury. 3703

The result is, that evidence was suffered to go to the jury, tending to prove the value of the defendant's real estate, when, for the purposes of any question properly submitted to the jury, such evidence was wholly irrelevant.

If we could see that evidence showing the defendant's real estate to be worth from \$144,000 to \$167,000, by any rational view of what is possible, could have influenced the minds of a jury unfavorably towards him, upon the question whether he had or had not committed adultery, or whether the plaintiff was or was not guilty, we might feel bound to order a new trial, because such evidence was received.—*Marquand vs. Webb*, 16 J. R. 90; *Osgood vs. Manhattan Co.*, 3 Cow. 612; *People vs. Wiley*, 3 Hill, 194; *Weeks vs. Lowere*, 8 Barb. 534; *Clark vs. Vorce*, 19 Wend. 232; *Dresser vs. Ainsworth*, 9 Barb. 625; *Myers vs. Malcolm*, 6 Hill, 296; *Boyle vs. Colman*, 13 Barb. 42; *Worrall vs. Parmelee*, 1 Comstk. 520; *Carrs vs. Sprague*, 12 Wend. 41. 3704

The cases cited, and others therein referred to, warrant us in saying that where the admission of the evidence on its face and by legal necessity could do no injury, because it does not bear *in the least degree* on the question in issue, it may be disregarded.

It was not offered nor received for any purpose affecting the main issue, and it was so expressly stated, and only received under that limitation.

3706 For the purposes of such an inquiry as this, the jury must be assumed to have ordinary intelligence and to be governed by conscientious motives. To suppose that proof that the defendant was worth \$144,000 could affect their determination of the question, whether he or the plaintiff had committed adultery, is to deny to the jury, as we think, common sense. And to suppose that they would allow such evidence, when received for another and totally distinct object, to influence them improperly on this question, is to deny them common honesty.

We think, for this reason, that the admission of the
3707 testimony furnishes no ground for reversing the judgment. If we are in error in our conclusion, that the amount of alimony was not a question proper to be submitted to the jury, then it is obvious that the testimony so admitted was competent, because it tended directly to one of the chief elements taken into view in determining that question.

The next inquiry is, whether the judgment should be reversed because the question, What amount of alimony ought to be allowed to the plaintiff? was submitted to the jury. We have no hesitation in saying that it ought not. Although we are of opinion that the jury were not
3708 to determine that question between the parties, and that, for the purposes of the trial, their views upon that question were immaterial; we cannot discover or imagine that any injury resulted to the defendant from taking their opinion upon that subject, unless the Court made it the basis of the further decree for alimony afterwards made, which subject will be presently considered.

The jury having found upon the questions upon which the right to a divorce depended, it was, at most, superfluous to ask them to say what alimony should be

awarded. Their finding upon the latter question had no possible bearing upon the former. 3709

Under § 261 of the Code, a discretion is given to the Court to instruct the jury *in all cases* to find upon particular questions of fact. If the verdict is in other respects correct, it would be unreasonable to say that it must be set aside if the Court should take a finding from the jury upon a matter that was in truth irrelevant, which could not influence the general verdict, or the finding upon the other questions.

On that subject, the general rule must be that it rests in the discretion of the Judge to submit such questions as, at the time, he thinks proper; and if, upon the whole verdict, the plaintiff is entitled to judgment, the 3710 circumstance that, in addition to a finding upon material questions, we have also a finding upon some that are not material to any determination proper to be made by the jury, ought not to vitiate the verdict.

So that we say, as in relation to the last point discussed:

If we *err* in holding that this was not a proper question to be submitted to the jury, then, of course, the defendant's exception fails; and if we are right, then the submission of the question to the jury, and their finding thereon, was mere surplusage—it injured no one, and 3711 should be wholly disregarded.

DEFENDANT'S TWENTY-SIXTH AND TWENTY-SEVENTH POINTS.

It remains to consider, under the defendant's appeal, the proceedings had after the coming in of the verdict, in which the jury had found that \$3,000 ought to be allowed to the plaintiff, and to which the defendant's Twenty-sixth and Twenty-seventh Points are addressed.

The Bill of Exceptions states, that the cause having been brought on for further hearing for the judgment 3712

of the Court, the defendant's counsel claimed and insisted that "the Court was not authorized to make any award of alimony upon the matters aforesaid."

If by this was meant that the Court was not authorized to award alimony at all, this claim was plainly unwarranted, and in the very face of the statute.

If it was meant that there was an irregularity in the manner of bringing on the cause for a further hearing, then we can only say that the objection for want of regularity should have called the attention of the Court to
 3713 the supposed irregularity.

If it was meant that the *jury*, and not the Court, were to determine the question, the views above expressed dispose of that objection, and we may add, that if it was a question for the jury, their finding was of the precise amount the Court awarded.

If it was meant that the case was not in readiness for such further decree, that the proper inquiry had not yet been made by the Court, and that the verdict of the jury on this point ought not to be taken into view, it being without their province, and that a reference to ascertain the facts bearing on the question, or a taking of proofs by the Court, in some manner so that the de-
 3714 fendant might produce witnesses as to the *value* not only, but also as to the *income* of the defendant's property, and to the other various circumstances which, as above stated, are to be considered by the Court in determining the amount of alimony—if this was the meaning of the objection, and, though not very clearly expressed, it seems to us to warrant that construction, it was reasonable.

The language of the subsequent objections, to wit: That three thousand dollars a year was extravagant and unreasonable; that alimony should be only allowed from the date of the decree; and that, if alimony should be
 3715 awarded from the date of the filing of the bill of complaint, the voluntary provision made by the defendant

for the plaintiff's support, from the time of the commencement of the suit until the date of the decree, should be taken into view, seems to indicate that further inquiry was insisted upon.

Although the cases above referred to show that the extent of the allowance rests in the discretion of the Court, the cases on this subject do not show that in general the permanent alimony is to take effect from the filing of the bill. In most of the cases the permanent provision is made to commence at or about the time of 3716 the decree for a divorce. *Miller vs. Miller*, 6 J. Chy. R., 93; *Pickford vs. Pickford*, 1 Paige, 274, and see also *Lawrence vs. Lawrence*, 3 Paige, 267, and other cases above referred to. In *Richmond vs. Richmond*, 1 Green's Chy. Rep. (N. Jersey), 90, it is held that there is no fixed rule as to the amount, that each case depends upon its own circumstances; that a regard should be had to the actual rents and profits of the defendant's estate, and the actual wants of the complainant, but not solely to those considerations, and in estimating such rents and profits the estimate should be taken *not* by its value *at the filing of the bill* but at the date of the Master's report. And on the other hand, in *Burr vs. Burr*, 10 Paige, 3717 38, the Chancellor directed explicitly that the alimony should commence from the filing of the bill (in that respect correcting the decree made by the Vice-Chancellor, which allowed alimony only from the date thereof). And his decree in this respect is affirmed, on a full discussion of the subject, by the Court of Errors, 7 Hill, 208. But the Chancellor directed that the *ad interim* alimony received by her, or her solicitor, *pendente lite*, be deducted. See *Rose vs. Rose*, 11 Paige, 166.

Our conclusion is that it was not *erroneous* to allow alimony from the time when the suit was commenced, if, under all the circumstances, that seemed just to the 3718 Court. There was no evidence produced, on this further hearing, in relation to the voluntary payments of the de-

defendant pending the suit, unless it be, perhaps, the statements of the witnesses and the affidavits read on the trial, as found in the minutes of the Court, and these do not appear to have been referred to as the basis of the further decree. The Court are represented as deciding that alimony should be allowed without any deduction for such voluntary payments. If the facts on this
 3719 point were agreed to by counsel, it does not so appear.

And it is quite difficult to say, upon the statement contained in the Bill of Exceptions, whether any thing was before the Court, as the ground of the order, except the pleadings in the action and the verdict of the jury. The decree of the Court, however, states that the Court, "upon consideration of the facts admitted by the defendant in the pleadings," determined that the allowance of three thousand dollars a year from the day this action was commenced, during the natural life of the plaintiff, is just, "having regard to the circumstances of the parties respectively," and ordered, adjudged, &c., accordingly.

3720 We have already said, that we think that the verdict of the jury furnished no proper guide on this question. And the only admissions in the pleadings are, that the defendant's real and personal estate is worth one hundred and fifty thousand dollars, and the income therefrom is four thousand dollars.

Upon this part of the case we think an opportunity should have been permitted to the defendant to produce proofs, and, either on a reference or on a hearing before the Court, show the facts and circumstances which are proper to be considered in determining the amount of alimony, the time when it should commence, and
 3721 whether any and what voluntary or other allowance *pendente lite* had been made to the plaintiff by the defendant. The views which we entertain, in regard to the points raised by the plaintiff's appeal from the decree herein, confirm us in our opinion that this portion of the

decree should be the subject of further inquiry. It seems to us that that part of the decree, which requires the plaintiff to release her inchoate right of dower in the defendant's real estate, must necessarily be taken to have influenced the Court in fixing the amount of the plaintiff's allowance during her life, and our conclusions in regard to that requirement of the decree render it 3722 necessary that the provision to be made, in regard to alimony, should be the subject of inquiry, if the defendant shall elect to have a reference for that purpose.

We have only to notice the further exception to that requirement of the decree which directs that the defendant give security for the payment of the allowance, by a lien upon his real estate within this State or otherwise, as may be directed by the Court upon the coming in of the report of the clerk of this Court, to whom the matter is referred. No objection to this part of the decree was urged upon us on the argument of the appeal. The statute in terms authorizes the Court to require such security (2 R. S. 148, § 59 [60]). The 3723 practice of the Court of Chancery in like cases sanctions it (*Miller vs. Miller*, 6 J. Chy. R., 93; *Burr vs. Burr*, 10 Paige, 38, and other cases above referred to), and the decree in this respect was within the ordinary power of the Court to refer a matter of this description, if it was found convenient.

If, however, the defendant shall elect to have a reference, to determine the amount of alimony, the security to be given therefor can be included in the same reference.

The order herein will therefore be, so far as it is based upon the defendant's appeal, that the judgment be re- 3724 versed, so far as it determines the amount of the alimony to be awarded to the plaintiff, and the time from which it is to be allowed. And a reference is ordered to some proper person, to be agreed upon or appointed by the Court, on settling the order, unless the defendant shall

prefer to allow the judgment in this respect to stand, and shall so elect. The same referee may also, as above suggested, inquire into and report what security should be given.

PLAINTIFF'S APPEAL.

3725 The points raised by the defendant upon his appeal being considered, there remain for determination the exceptions taken by the plaintiff from the decree made on the final hearing.

The decree, after directing the payment to the plaintiff of three thousand dollars by way of annual allowance, and requiring the defendant to give security for the payment thereof, &c., ordered that, whenever the right of appeal shall have been determined, either by lapse of time, affirmance of the Court of last resort, or a voluntary waiver of the right of appeal, and upon tendering to the plaintiff the required security for the payment of the allowance aforesaid, "then the plaintiff

3726 "shall execute and deliver to the said defendant a release "of any claim of dower in his real estate, in such form "as any justice of this Court shall settle and approve." To this part of the decree the plaintiff's counsel excepted, insisting that no provision should be inserted concerning dower, or, if any, that such provision should do no more than give the plaintiff her election, when her right to dower should become absolute, by her surviving her husband, whether she will take such dower or continue to receive the allowance now ordered, in lieu thereof.

3727 We cannot resist the conviction that the Court erred in forcing upon the plaintiff this condition.

According to the face of the decree, the Court, upon the pleadings alone and upon the *defendant's* admissions therein, without *any proof* of the present or probable prospective income derivable from the defendant's real estate, and without any reference to its possible increase in value and productiveness, or the further acquisitions of the defendant, arbitrarily require the plaintiff to relinquish all claim to dower therein. And to this the Court left her no alternative, unless it be to refuse to take the divorce itself. No doubt the Court deemed 3728 three thousand dollars a year of more value to the plaintiff, beginning from the commencement of this action, than her inchoate right of dower; but even the option, to decline the alimony ordered and retain her right to dower, does not appear to have been tendered to her. As the judgment stands, the divorce is decreed, and she is peremptorily required to relinquish her right of dower. How her release, mentioned in the decree, is to operate, whether she has such an interest or right as would pass to the defendant by a mere release to him, so as to exonerate the land, we need not inquire. The object of the decree was, clearly, to require such a release as should forever preclude any claim of dower in future. We 5729 apprehend that it is now well settled, that the right of a wife to dower in her husband's real estate cannot be prejudiced by any act of his.

It was for some time doubted whether, under our statutes, a woman, divorced *a vinculo matrimonii*, had dower in the real estate of her former husband at his death.

The statute (1 Rev. Stat., 740, 741), after providing for the endowment of a widow with the third part of *all* the land whereof her husband was seized, &c., *at any time during the marriage*, provides, in § 8, "in case of divorce, dissolving the marriage contract, *for the misconduct of the wife*, she shall not be endowed." Chancellor Kent, in his Commentaries, vol. 4, p. 53-4 and notes, 3730

regards this provision as needless, because a divorce *a vinculo matrimonii* always barred the dower of the wife at the common law, since "she must have been the wife at the death of the husband."

Similar language, in the statute concerning divorces (2 Rev. Stat., 146, § 47 [48]), provides that "a wife, being a defendant in a suit for a divorce brought by her husband and convicted of adultery, shall not be entitled to 3731 dower," &c.

Notwithstanding the apparent implication, from the two statutes, that she would be entitled to dower in all other cases than the one expressly named, viz.: a divorce obtained *against her* for her own adultery or other misconduct warranting such a divorce, Vice-Chancellor McCoun, in *Day vs. West*, 2 Edwds., 596, says: "where she proceeds against her husband and obtains a divorce *a vinculo*, all right to dower is gone, because of the dissolution of the marriage and the relation of husband and wife, since it is essential to dower that the marriage should subsist at the death of the husband. She cannot have dower if not the *wife* of the man, in whose lands she 3732 claims it, at the time of his death." The reasoning of the Court in *Reynolds vs. Reynolds*, 24 Wend., 193, seems to warrant such a conclusion, as also *Cooper vs. Whitney*, 3 Hill, 99; see also *Charrand vs. Charrand*, 1 Leg. Obs., 134, and cases therein cited, as to the rule of the common law on this subject. But in *Burr vs. Burr*, 10 Paige, 25-6, the opinion of Vice-Chancellor Willard suggests, that such is not the rule under the Revised Statutes; on the contrary, that when the wife obtains a divorce from her husband on the ground of *his adultery*, she is still entitled, on his death, to dower.

And finally, in *Wait vs. Wait*, 4 Comstk., 95, after a 3733 full discussion of the subject, it is definitely settled by the Court of last resort, that a divorce dissolving the marriage contract, on the ground of the adultery of the husband, does not deprive the wife of her right of dower in his real estate.

We cannot discover, then, upon what ground this decree, compelling her to relinquish a right secured to her by statute, can be sustained. The opinion of the Court of Appeals, in the case last cited, shows that the alimony contemplated by the statute is not to be taken as in lieu of dower.

In *Burr vs. Burr*, also above cited, the fact that the wife, if she survived her husband, would be entitled to 3734 dower, was taken into view in the Court below, and neither in the Court of Chancery nor Court of Appeals was any doubt expressed of the correctness of the Vice-Chancellor's conclusion.

We apprehend that the right of the plaintiff to dower, if she shall survive the defendant, is given by statute; that her right to allowance, under the circumstances of this case (having established her title to a divorce), is clear, and that the Court cannot make the release of her right of dower a condition of granting the divorce, or impose the execution of such a release upon her peremptorily. 3735

It is true that the subject of alimony rests in the discretion of the Court, but, as said in *Burr vs. Burr*, in 7th Hill, that discretion is a judicial discretion and not an arbitrary one, and although the ultimate right of dower in the defendant's real estate, if the plaintiff survive the defendant, may be taken into view in fixing the amount of alimony, there is nothing in the statute which warrants the Court in compelling her to relinquish that right, nor has the practice of the Court heretofore sanctioned the imposition of any such terms upon the plaintiff.

When the property of the husband consists chiefly 3736 of personal estate, entirely subject to the husband's disposal in his lifetime, or by will, the inchoate right of dower should properly have little influence upon this question. And when, on the other hand, his property

consists chiefly of real estate, her dower in which, in the event of her surviving her husband, would be sufficient for her comfortable support, this should be deemed entitled to much weight in determining the extent of alimony.

And we have no doubt of the propriety of accompanying the award of alimony with a provision that, in case of the death of the husband, the same may be modified as may be just, in view of the right, which will then become absolute in the plaintiff, to have one-third of the rents and profits of such real estate during the residue of her life.

Indeed, we are disposed to adopt the view suggested in some of the cases referred to in the foregoing discussion of the points taken in the defendant's appeal, that the award of alimony is subject to modification from time to time, as may be just, and that leave should be given, in the decree, to apply for such modification as the changing circumstances of the parties, and especially the death of the defendant, and the accruing of an absolute title to dower, may render just.

Our conclusion, then, upon this appeal by the plaintiff, coincides with our conclusion under the appeal by the defendant, and is, that the decree, so far as relates to alimony, and no further, should be set aside, and the parties be permitted a further hearing upon that subject. If, however, the defendant prefers that the decree, so far as relates to the amount of alimony, should stand, then the only modification necessary is, to reverse that part of the decree from which the plaintiff has appealed.

N. Y. SUPERIOR COURT.

CATHARINE N. FORREST

agst.

EDWIN FORREST.

SPECIAL TERM, JUNE, 1859.

Application by defendant to examine M. Hall McAllister and C. W. Wilson, *de bene esse*, and for a reference.

N. CHASE and C. O'CONOR, *for Plaintiff*.

J. VAN BUREN, *for Defendant*.

WOODRUFF, *Justice*.

1. I have no doubt of the power of the Court to 3740 direct the taking of a deposition, which may be used as evidence upon the reference now pending herein, and I would not refuse an application to take testimony, unless I regarded it as quite *clear* that such a deposition could not be used when taken. I should, if the point were *doubtful*, think it only just to have the deposition taken, and leave the objecting party to raise the point, when the deposition is offered in evidence, and then, whatever may be the ruling, an exception may be had which it will be possible to examine on a view of the proceedings had on the reference; whereas, if I deny the motion, it may, perhaps, be wholly impossible to 3741 review my determination. I think, however, that the inquiry in progress, before the Referee, is a trial within the fair meaning of the statute, and, if otherwise, then regarding it as a matter before a Court of Equity, in a form other than a trial, that that Court had power to order a reference to take proofs.

2. The affidavits, on the part of the defendant, state the material facts necessary to entitle a party to ex-

amine witnesses conditionally ; although some doubt is
 3742 sought by the plaintiff to be thrown upon the good
 faith of the application, and upon the motive and pur-
 pose for which the testimony is desired. Yet the state-
 ment of the plaintiff rests mainly on suspicion, and
 though there may be circumstances which, to the plain-
 tiff's mind warrant those suspicions, they are not suf-
 ficient to justify me in discrediting the affidavits upon
 which the motion was made.

3. The fact that the reference is now in progress be-
 fore the Referee (being continued, of course, by adjourn-
 ments), and that, apparently, it is possible to summon
 witnesses directly to the trial and examine them, makes
 3743 me hesitate in granting the order. But the plaintiff has
 not rested her case before the Referee. This Court de-
 cided that it was no reason for rejecting a deposition,
 when offered on a trial before referees, that the witness,
 whose deposition was offered, had been in the city pend-
 ing the reference, and might have been examined orally
 before the Referees. That a party was not bound to
 change his offer of proof, through an apprehension that
 some, or one of his witnesses would leave, although if
 he took the risk he would lose the testimony, unless he
 could procure his deposition.

Sheldon vs. Wood, 2 Bos. R. 279. (IN PRESS.)

Various circumstances may defeat an endeavor to de-
 3744 tain the witnesses until, in due order of proof, they can
 be regularly examined on such trial.

I think an examination should be permitted. I there-
 fore grant the motion, and direct a reference to the same
 counsellor, as Referee, before whom the reference of
 the question in controversy is now pending.

Costs of this application, fixed at \$10, are to be al-
 lowed as costs in the cause, and the costs of the taking
 of the testimony are to be paid by the defendant.

N. Y. SUPERIOR COURT.

CATHARINE N. FORREST

agst.

EDWIN FORREST.

SPECIAL TERM, JULY, 1859.

3745

Motion by plaintiff to require Referee to proceed with reference, or to change Referee, and for alimony *pend. lit.*, &c.

C. O'CONOR, *for Plaintiff.*J. T. BRADY, *for Defendant.*

July 19th, 1859.

WOODRUFF, *Justice.*

The only questions remaining to be settled in this case are, the amount which should be allowed to the plaintiff for alimony, and the manner in which that should be secured to her. To determine those questions, we have ordered a reference. The plaintiff is left by the defendant, her late husband, entirely destitute. Although entitled to share justly and equitably the income of one who, according to the papers before me, has 3746 a fortune of half a million of dollars, she is left to her own personal exertions to obtain the necessities of life.

And this, when it is entirely certain that her late husband owes, and must be decreed to provide, her a comfortable support.

This is true, even though we should assume him innocent, and presume that such innocence may appear on a reversal of the judgment of this Court ; for, if, instead of being divorced, he were her husband still, he is bound to support her.

So that, whatever be the result of this struggle on his part, a comfortable support is due, and must be decreed to her, or furnished to her by him, in any event.

3747

For the purpose of the reference ordered, he is to be deemed, as he has been adjudged, guilty, and she is to be deemed entitled to alimony.

It is true that she has not heretofore urged her claim with the eagerness which might have been expected, but her delay is explained, and certainly that delay has not operated to the defendant's disadvantage. If he had deemed it undesirable, he could have moved the reference himself.

3748 Now she has found means to press her claim, and counsel willing to devote their time to its prosecution, and she presents herself apparently, and according to her statement, in need of that support to which she is clearly entitled.

Her first endeavor has been so far defeated, that, against her objection and that of her counsel, the hearing is adjourned for three months, to enable the defendant's counsel to go to Europe.

She, in a state of destitution, dependent hitherto upon the good-will of her counsel, and compelled to await their convenience, is thus postponed until it is in a high degree probable their engagements will again de-
3749 prive her of their services, in order that the defendant, who is abundantly able to employ any desired number of counsel, may be in no danger of inconvenience while his counsel are absent for months from the city.

This seems to me manifestly unjust.

The suggestion, that the months of July, August and September are vacation months, in which it is the right of the defendant to have the case suspended, is to me a novel one. Although the arrangement of the terms of Court are so made that, as far as possible, the comfort of jurors, witnesses and suitors may be promoted by relieving them from attendance upon crowded court rooms in the heat of summer, yet the period is not uniform in
3750 the various Courts, and nothing is more common than for references to be sought and granted for the very

purpose of avoiding the delay which the interruption of the monthly sessions of the Court for trial would otherwise cause.

For other purposes the Courts are open, and one or more of the judges are in daily attendance.

But in expressing the opinion that the delay which would be caused to the plaintiff is unjust, I state not my own opinion only, but the declared judgment of the General Term. A motion to postpone to October an appeal involving the most important question to the defendant which is connected with this reference, was denied, though urged upon the very grounds on which the postponement of the reference is justified. The Court thought the plaintiff ought not so to be hindered in the obtainment of an obvious right, and to be left destitute of the means of support, while the defendant's counsel was pursuing either pleasure or business in Europe. 3751

I am clearly of that opinion in regard to the reference itself, and the views which I entertain in regard to the proper subjects of inquiry, on the reference (and which on a former motion I have expressed), lead me also to the conclusion that the reference ought not to be protracted beyond a very few sittings, and that any counsellor of ordinary capacity, skill, and learning is abundantly competent to protect the defendant's interest on this reference, whether he has been familiar with the prior stages of this litigation or not. 3752

I entertain the most sincere respect for the fairness, good faith and impartiality of the Referee, and have unquestioning confidence that he has done what he deemed in entire accordance with the right of the defendant in adjourning the reference. But he erred, I think, in not considering sufficiently the plaintiff's right to have her support provided, when her right to support had been already settled by a decree, and the amount alone remained to be fixed. 3753

The Court would not, of course, compel a Referee to act against his inclination, and at a sacrifice of personal convenience, which he felt unwilling to make, when there are, no doubt, many who are not only willing but desirous of rendering such services.

Whether the Court can regularly make an order vacating the order of adjournment, may be open to question. That the Court can vacate the order of reference, and direct a reference to some person whose engagements and inclinations are such that the reference will be proceeded in with reasonable dispatch, is not doubtful.

If the present Referee can so arrange his business as to continue the reference, and the defendant consents to vacate the order of adjournment, that the reference may proceed without further delay, that course should be taken; but if not, then the order of reference should be vacated, and a reference be directed to some suitable person who will attend and hear the parties and their proofs at once.

In relation to the application for alimony, pending this reference, there seems to me to be no reason why it should be withheld; on the contrary, the considerations above suggested are strong reasons why it should be granted; not only so, it is the uniform practice of the Court to grant it without special reasons.

The circumstance, that six or seven years ago, in San Francisco, the plaintiff received considerable sums as the proceeds of theatrical exhibitions under her management, becomes of slight importance in this connection, when it appears that the plaintiff is now destitute and unable to pay the expenses of the reference.

I perceive no just reason why the defendant should have at any time withheld the allowance which he voluntarily made to her down to November, 1851.

As already suggested, his obligation to pay is not, as the case now stands, in any degree doubtful; and it will

be strange if, when the permanent alimony shall be fixed, there be not a very large sum in arrear, which it will be the duty of the defendant to pay. With him, therefore, the question whether he shall now pay something towards the plaintiff's support pending the reference, and something towards the expenses, is only a question of *time*, and to my mind it is reasonable that the plaintiff's wants should receive some consideration; and to require him to pay something now out of the income of an estate, of which the principal is said to amount to five hundred thousand dollars, is only requiring him to pay now what it seems to me certain he must pay hereafter, unless the death of the plaintiff before any sum is fixed should operate to release him. 3757

The circumstance that the plaintiff has not made the application sooner is to his advantage. Had the petition been presented three years ago, it must have been granted. He should not complain that it has been delayed.

On this branch of the application, the order will be, that the defendant pay, for the support of the plaintiff, at the rate of two hundred dollars per month, beginning with the presentation of this petition, and that he advance to her fifteen hundred dollars towards counsel fees and expenses of the reference. 3758

It will be necessary that the order to be entered be settled on notice, and the details conforming to the directions above indicated, as well respecting the continuance of the reference as the making of the payments, will then be settled.

NEW YORK SUPERIOR COURT.

3759

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| CATHARINE N. FORREST, | } |
| Respondent, | |
| <i>against</i> | |
| EDWIN FORREST, | |
| Appellant. | |

GENERAL TERM, JULY, 1869.

Before BOSWORTH, *Ch. J.*, WOODRUFF, PIERREPONT &
MONCRIEF, *JJ.*JAMES T. BRADY, *for Appellant.*C. O'CONOR, *for Respondent.*BY THE COURT—BOSWORTH, *Chief Justice* :

The opinion of the judge, who made the order appealed
3760 from, assigns three substantive grounds in support of the
order :

1. That the defendant has been guilty of *laches*, in not
moving for a commission at an earlier day.

2. That a commission, in the form of the one sought,
should not be granted, even if the Court has the power
in extraordinary cases to award it.

3. That the facts sought to be proved by means of
the commission are not proper to be given in evidence
on the reference.

The appellant insists :

First. That he has not been guilty of any delay which
should deprive him of any right or favor, to which, but
3761 for such delay, he would be entitled.

Second. That he was entitled, at all events, to the
ordinary commission without a stay of proceedings.

Third. That he was entitled to a commission to examine witnesses orally.

Fourth. That the facts sought to be proved are relevant and material in determining the question, what alimony, or whether any alimony should be allowed.

The alleged facts sought to be proved are : (1st) illicit intercourse with several persons, not named ; (2d) intemperance ; (3d) extravagance ; (4th) a vicious and debased association and mode of living. 3762

The misconduct charged is alleged to have occurred in California, subsequent to the judgment of divorce (which was entered on the 31st day of January, 1852), and prior to the order of reference now pending, and which was entered (on the 24th day of July, 1856) on the reversal, by the General Term, of that part of the judgment, or decree, relating to the amount of permanent alimony to be allowed. The plaintiff was in California from May, 1853, to April, 1856.

In this connection, it may be observed, that the pending reference is not a proceeding in an action at law. If not a proceeding in an equity suit, properly so called, it is a proceeding in a suit of which, prior to the Code, 3763 a Court of Equity alone had jurisdiction (under the laws of this State).

This Court, having jurisdiction of the action, is thereby vested with all the powers of the old Court of Chancery, in respect to the subject matter of the suit, and which it might rightfully exercise to possess itself of the information requisite to decide the suit, or make any interlocutory order, or any order or decree in it, subsequent to a determination of the main points of controversy, according to justice and equity.

I shall therefore assume, that this application should be disposed of, precisely as the late Court of Chancery would dispose of a like motion, made under the same 3764 peculiar facts and circumstances.

It will hardly excite surprise, if no adjudication can be found directly in point, upon the question of the competency of some of the facts sought to be proved, and the effect which should be given to them if established.

The provisions for permanent alimony usually form part of the decree for a divorce, or are embodied in a further order or decree, made before a new state of facts 3765 has arisen.

Intemperance and extravagance may precede the institution, by a married woman, of a suit for a divorce, and may have continued up to the time the decree was pronounced.

But illicit sexual intercourse, on her part, could not ordinarily precede the institution of a suit prosecuted by her to a successful issue. It would be natural to expect that the effect of such misconduct upon the question of permanent alimony would, ordinarily, be determined upon applications (made subsequent to the order by which it had been fixed) to modify or discharge it, in 3766 consequence of such misconduct, if it be true that a Court of Equity could interfere with that matter for such a cause.

Section 43 [45], 2 R. S., 145, declares that, in a case like the present, "The Court may make a further decree or order against the defendant, compelling him to provide such *suitable* allowance to the complainant, for her support, as the Court shall deem *just*, having regard to the *circumstances* of the parties respectively."

By Section 58 [60], "The Court may require such husband to give reasonable security for such * * allowance;" and, if he neglect or refuse, the course to be 3767 pursued to secure the payment of the allowance to her is prescribed.

It is urged that, under Section 43, only the circumstances of the parties respectively, as they exist at the

time of pronouncing the decree, are to be considered in determining what will be a suitable and just allowance.

It is not denied, however, that many matters, other than the pecuniary means of the parties, are "circumstances" which the Court must consider.

The fortune of the husband may be such that its income will support both, separately, as they have been accustomed to live, without the necessity of labor on the 3768 part of either. In such a case the wife also may have a separate property, the income of which alone will be sufficient to support her as she has been accustomed to live; or, she may have no separate income.

In another case, the husband may have no productive property, and yet may be in the receipt, from his profession or avocation, of a sum sufficient to support both, as they have previously lived, if living together, but insufficient, if living separately.

In one instance the wife may be a confirmed invalid, and unable to do anything towards her support; and in another she may be able to support herself, by the same pursuit, or by some pursuit kindred to that in which 3769 the defendant has earned his fortune, and which she may be competent, and, as a matter of taste and choice, be willing to prosecute.

Would a provision, which in the latter case would be just and suitable, be just and suitable in the former? Should an allowance of the same precise amount be made in each of the two cases last supposed? If not, then the pecuniary faculties of the parties are not alone to be regarded; unless the definition of the term is made so comprehensive as to include a capacity to earn the means of support in whole or in part. If it be made to include that, then, in some of the cases sup- 3770 posed, the injured wife might, with her view of the fitness of things, deem it a personal degradation to perform upon the stage or in a public concert. As a

matter of religious conviction, it might be that she could not be induced to attend the former, even as a spectator. Another woman might find her chief happiness in the applause which her performances would elicit.

An allowance made to the one, upon the basis that she might, and therefore should contribute to her support, by appearing as an actress or public performer, 3771 would involve her in misery ; while, made on the same basis to the one who had no such scruples, would provide her with all that she would desire.

Is any regard to be paid to the religious convictions of the one, or to the effect which a resort to such pursuits would work in her social relations and position, or to the reputation which such associations might create among those whose good opinion she would most value, viz.: the religious and more cultivated and moral portion of the community ?

Without undertaking to say which class is right, or which wrong, or that either is exactly right, we all 3772 know that a large class of the community, and a class, too, that is regarded as the more moral, because the most consistent in conforming their conduct to the religious doctrines which they profess and cherish, regard theatres as schools of vice, and feel and act upon the conviction that it is sinful to witness their exhibitions.

Another class regard them with favor, and the entertainments they furnish as worthy of patronage. In this class are included many who hold high positions in the circles denominated and considered by the bulk of the community as the first circles or classes of cultivated society.

3773 Many would regard all expenditures made to secure the pleasures incident upon attending theatrical performances, whether paid as the price of admission, or to dress in a style deemed suitable to the occasion, as inexcusable extravagance, and constant attendants upon the

theatre as persons to whom "a vicious and debased association and mode of living" might be justly imputed.

This consideration alone shows how difficult it is to state any rule by which it can be accurately determined, in a manner that will operate justly upon all parties to such actions, what is and what is not extravagance, and what is a vicious and debased association in such sense that, by reason of a complainant's being guilty of it, a diminished amount of alimony should be allowed to her.

Some kinds of conduct and some kinds of association may be treated as being, in the common judgment of civilized society, so gross and vicious as to be absolutely degrading.

But there is also an endless variety of conduct, and of association inseparable from it, in respect to the morality and debasing tendency of which, persons of intelligence, of a fair general morality, and of good purposes, differ.

And the same considerations are equally applicable to various sources of enjoyment, and the kind of life, and association, which they, to some extent, induce, and to the consequent charges of extravagance, or debasing association which might, in the judgment of many, be predicated of them.

Is each one, whose duty it may be to sit in judgment in a case like this, to determine what is extravagant, or what association is debasing, by his own habits and personal opinions, and be influenced by them in settling questions like those now presented, or is there some general principle by which such questions must be determined, without considering the great variety of views and opinions which it would be necessary to do, if all, or any of the facts now sought to be proved, were proper subjects of evidence?

The rank and position which the parties occupy in society, and their general mode of life, should be considered, and the allowances made, as a general rule, should, at all events, be sufficient to enable the wife to continue in the enjoyments to which she has been accustomed, when the husband's income is adequate to support both as they have been accustomed to live.

Whether that allowance be expended in part indiscreetly or not, does not concern the husband. To a just and suitable allowance she is entitled. As a general rule, the particular application of it is a matter entirely for her own determination; whether she shall so change her habits as to economize and accumulate, or whether she will expend a part, and if so, what part, upon objects which she regards as charitable or deserving of encouragement, or in a manner which some may deem useless or extravagant, are subjects in respect to which the husband, the party in fault, has no right to be heard.

It is his duty to provide the means for her support and maintenance, to the amount determined to be suitable and just; her manner of expending it, he has no right to dictate.

Whether, in some of the extreme cases supposed, on the argument, such as the idiocy, or lunacy of the wife, any greater sum should be allowed than would be requisite to defray fully the expenses of maintaining her, it is not important to consider. In such cases she would be destitute of the capacity to appropriate any sum which might be allowed, and it would not be inconsistent with any conclusion yet stated, to limit the allowance to a sum which would cover her actual expenses, as it might be deemed suitable to provide for her.

But this case presents us no such question, and therefore does not require any minute consideration of it.

The allegations of the petition, on which the commission was moved for, are, "that during the two years or

so, that she resided in San Francisco, she gradually fell from the favorable position first accorded to her, and acquired the reputation of being a woman of bad morals, and dissolute and extravagant life, addicted to the excessive use of ardent spirits, and also unchaste, not with reference to one person alone, but to several."

That the petitioner "has derived information of acts of intemperance, immorality, fornication, and adultery, 3780 on the part of said plaintiff, during the period referred to, from statements made by *witnesses thereof*, in some instances, and from careful inquiry as to facts which were within the knowledge of other witnesses, and could and would be testified to, if the testimony was required or compelled."

The plaintiff, in an opposing affidavit, declares and testifies, "that she never has, either in California, or in any other place, committed adultery, or fornication, or committed any violation of chastity."

She "says she cannot deny having spent and given away money to an extent which prudence forbade; and so far she is perhaps liable, in a degree, to the charge of 3781 extravagance; but she denies that, either in California or elsewhere, she has led a life of intemperance, or vice, as, according to his usual habit of assailing this deponent, the said defendant hath untruly alleged in his petition."

If it be true, as the defendant's petition seems to state, that persons, who have been "witnesses" of acts of fornication and adultery, on the part of the plaintiff, have so told him, then assuming these acts to be material, he needs only their testimony, if they are entitled to credit, and if they are not entitled to credit, proceedings should not be delayed to examine them.

If the phrase "witnesses thereof" was intended to be applied only to "acts of intemperance and immorality," 3782 or to one of them, then it may be said that the charge is very indefinite, and the acts claimed to be acts of intemperance, or immorality, are not defined.

If the immorality meant be other than "the excessive use of ardent spirits," or "fornication," there is nothing in the petition to indicate very clearly of what it is supposed to consist.

If acts of fornication, subsequent to the decree, are inadmissible in evidence, upon the question of the alimony to be allowed, then I think it may be assumed that subsequent acts of intemperance are.

3783 The true solution of this question must depend upon the rules and principles on which alimony is awarded, and its amount determined; to be ascertained from the series of decisions made in such cases, and the statutes upon the subject, and not upon any arbitrary and fluctuating notion of what may be seemly and proper, or desirable, in a case of such facts as are alleged to exist in this particular case.

It must be obvious that the decisions in the Ecclesiastical Courts of England do not fully meet the precise case; for the reason that they leave the marriage relation subsisting, and the husband under a legal obligation to provide the wife with at least the necessities of life; and
3784 she is not wholly freed from obligations to him. He has still an interest in her, and may justly be deemed to be afflicted by her misconduct.

In those Courts, although a separation be decreed, for the adultery of the wife, an allowance is provided for her; and the considerations which, in such a case, might justly moderate its amount, can have no just application to the case of a woman absolutely divorced for the misconduct of her husband, or upon the question whether the amount of alimony (having been rightfully determined at the time the decree of divorce was pronounced) can be reduced for her subsequent misconduct. The
3785 decisions in those Courts, from the necessity of the case, have not been made upon any such state of facts, and, consequently, have not established any rule which precisely meets them.

By the rules of the common law, upon the marriage the husband is vested with all the present available means of the wife, together with a right to her future earnings and acquisitions. At the same time the law casts upon him the duty suitably to maintain his wife, according to his ability and condition.

When a marriage has been duly solemnized, each of the married parties acquires thereby certain legal rights, 3786 as against the other. not to be forfeited, unless for some breach of matrimonial duty. "When an erring one has broken the matrimonial engagement, the law gives to the innocent party such redress as the nature of the case and the constitution of the tribunal allows." If a "husband has committed adultery, the Court can neither watch him during his after life, to prevent his repeating the offense, nor wipe out from his nature the stain which the sin has imparted, nor take off the weight of sorrow from the mind of the wife; but, if she chooses not to overlook the transgression, it can compel him to" provide "for her what the marriage gave her a right to demand, a pecuniary support."—Bishop on Marr. & Div., 3787 Ed. 1859 (§560, 560 c).

What she may do after she has been divorced, and the marriage relation has been dissolved by reason of his adultery, can affect no matrimonial engagement, for none exists; nor violate any matrimonial duty, for she no longer owes any to her former husband.

What he should be made to pay as the means of her future support, according to all general rules of judgment, must depend upon the facts which create the right to it; and they must be the facts existing, and as they exist, when the right becomes fixed and perfect. The time of pronouncing the decree is the one at which the 3788 right is judicially ascertained and declared.

From that moment the marriage relation, and all duties consequent upon it, are ended; except the duty

of the husband to make such a provision for the support of the wife as the marriage made it his duty to furnish, and gave her the right to demand, having regard to the circumstances of the parties respectively.

Our own statutes on this subject seemed to have been framed with this view, as being the true one in relation to her rights.

3789 By the statutes of this State, if a wife obtain a divorce by reason of the adultery of her husband, and if, at the time the decree is pronounced, she "be the owner of any real estate, or have in her possession any goods, or things in action, which were left with her by her husband, acquired by her own industry, given to her by devise or otherwise, or to which she may be entitled by the decease of any relative intestate, all such real estate, goods, or things in action shall be her sole absolute property."—2 R. S., § 146, § 44 [46]; 2 R. S., 190, § 6.

So, too, if the wife be the guilty party, and a divorce be granted for that cause, she not only forfeits all right 3790 to dower in her husband's real estate, or any part thereof, and to any distributive share in his personal estate (id. 46 [48]), but the husband's right "to any real estate owned by the defendant, at the time of pronouncing the decree, in her own right, and to the rents and profits thereof, shall not be taken away or impaired by such dissolution of the marriage; and he shall also be entitled to such personal estate, and things in action, as may belong to the defendant, or be in her possession at the time such decree shall be pronounced, in like manner as though the marriage had continued."—Id. § 45 [47], and 2 R. S., §§ 7 and 8.

3791 Sections 44 and 45, according to their terms, operate upon the property and rights of which they treat, and which they settle, as of the time of pronouncing the decree of divorce; but they deprive the guilty party of all rights of property acquired by the marriage; and if

the wife be the guilty party, they do not restore, but, on the contrary, prohibit the Court from restoring to her for her support and maintenance any property which she owned at the time of the marriage, or acquired during coverture. Neither section forty-three, nor any other section of our statutes in terms authorizes the Court to award any allowance for her support and 3792 maintenance, when a divorce has been granted by reason of her adultery.

If, therefore, the New York Court of Chancery had no power to award permanent alimony, except in the cases specified in the statute, it may be, that it could grant none in such a case as *Darly vs. Darly*, Wright's Ohio Rep., p. 514, nor to any woman whom it might divorce, by reason of her adultery. But on this point it is not necessary to express any definite opinion.

For, whether or not the Courts must look to the statutes alone for their power to grant permanent alimony, and find in them the source and limits of their authority, the argument is quite strong, that the rights 3793 of the parties are to be settled and fixed upon the facts as they exist at the time the decree of divorce is pronounced.

The rights declared by sections 44 and 45 cannot, I think, be modified or affected by the subsequent licentiousness (however gross) of the party to whom they are thus confirmed.

And although a woman, who, in a suit, brought against her by her husband for a divorce, if convicted of adultery, forfeits her right to dower, or to any distributive share in his personal estate (2 R. S., p. 146, § 48; 1 R. S., p. 741, § 8), and "every jointure, devise, and pecuniary provision in lieu of dower" (1 R. S., p. 742, 3794 § 15), yet, although she may, undiscovered by him, have committed adultery in his lifetime, she, probably, in the event of his dying intestate, would forfeit neither.

Yet in morals her offense is as grave, and should be attended with as serious consequences to her, though first discovered after his death, as if discovered and she had been convicted of it in his lifetime, in a suit brought by him to obtain a divorce for that cause.

3795 If section 43 can properly be construed as requiring a regard to be had only to the circumstances of the parties respectively, at the time the decree is pronounced, in fixing the amount of an allowance which will be suitable and just, and if, partly for that reason, the authority conferred by § 58 [§ 60] was granted, then these two sections are not only harmonious (although the allowance may be modified in the event of a subsequent change in the pecuniary condition of the parties), and the latter section will enable any order or decree made under the former to be enforced, but, in connection with the other sections cited, they furnish some warrant for holding that it was intended to be final, in such sense as not to be liable to be withheld by reason of the subsequent immoral conduct of the party whose support it was designed and made to
3796 secure.

No case has been cited, in which it was moved to have an allowance, fixed at the time of the decree, reduced for subsequent misconduct, or in which such a matter was treated as relevant or material for such a purpose, on an application to modify the allowance fixed by the decree.

Applications to change the rate of allowance, when once fixed, are not numerous, and *Mr. Bishop*, in his elaborate and instructive treatise on Marriage and Divorce, quotes the remark of *Dr. Lushington*, to the effect, that he remembers but two instances where applications to increase or diminish it have been successful
3797 (*Bishop on Mar. and Div.*, § 593, 3d Ed.), without intimating that his own researches had resulted in finding others.

Considering the length of time that this branch of the law furnishes evidence, through the reports and otherwise, of the mode in which it had been administered in this and other States of the Union, the fact, that such subsequent misconduct does not appear to have been presented as an element to affect the amount of the allowance, may be regarded as a strong and almost conclusive presumption against its admissibility.

I regard § 43 [45], 2 R. S., 145, not as permissive 3798 merely, but as imperative, and that it is the right of the wife to demand, and the duty of the Court to decree, a suitable allowance. (Laws of N. Y., K. and R., vol. 1, 93, § 2; 1 Greenleaf, do., 428, § 2, and 2 R. L., 199, § 5.)

Mr. Bishop, in the work already cited, reaches the conclusion, fully justified, as I think, by the authorities to which he refers, and the practice of the Courts, that "the doctrine extends through the entire field of our law, as administered alike in the Common Law, Equity, and Ecclesiastical Tribunals, that, in effect, whenever the wife is adjudged entitled to live separate from her husband, by reason of his breaches of matrimonial duty, a concurring adjudication must be pronounced that he 3799 support her while so living" (§ 561) during their joint lives (*id.*, § 572).

"The law seems to recognize the right of the wife to use one-third or more of the common estate, in its rules concerning dower, and the distribution of the effects of a deceased husband, and in reason the wife, living separate from her husband, should be permitted to spend one-third as much for her living as he for his." *Id.* § 619. See also §§ 617 and 618 to 623 *d.*

"When a breach of matrimonial duty has been committed, sufficient in extent and kind to authorize the injured party to separate from the offender, evidently on reasons already given" (*id.*, §§ 560 *b*, 560 *c*), "the 3300 offender should pay to the other as much as will place

the other in a pecuniary condition equal to what would be enjoyed if the breach had not taken place." * *
 "Now we have first, the damages suffered; secondly, a proceeding established by law wherein the judge has a discretion to award money, and no specific rule, either of statute or common law, established to limit the discretion below a consideration of the damages."
 (§ 619 *a.*)

He forcibly concludes that "there are some plain propositions of common sense governing this matter of
 3801 alimony on a divorce from the bond of matrimony, as follows: *First*, the innocent party should not be left to suffer pecuniarily for having been compelled by the conduct of the other to seek the divorce. *Secondly*, the wife, made thus in a certain sense a widow, should not usually be set back simply where she stood in point of property when she entered the marriage. * * * *Thirdly*, she should not stand worse than if death, instead of divorce, had dissolved the connection."

In *Richardson vs. Wilson*, 8 Yerger R., 67, the Court intended that the right of the wife to a support from her husband was a constitutional right, which the Legislature could not take away by a divorce bill
 3802 passed *ex parte*, and without notice to her, even supposing it to be effectual, as against her, to dissolve the marriage itself. In *Lawrence vs. Lawrence*, Chancellor Walworth remarks that "if she succeeds in establishing such improper conduct on the part of the husband to entitle her to a divorce or separation, she is entitled to a portion of the property as a *right* founded upon his violation of the marriage contract."

The legislation of such of the States (also cited and commented on by *Bishop*) as provides, in case of a divorce, for a division of the property, seems to be founded upon the rule, as one that is elementary and funda-
 3803 mental, that a woman, who obtains a divorce for the

adultery of her husband, has a right to a portion of his property, or to the use of it for her support and maintenance, and that what is suitable and just, so far as that question may be affected by the conduct of the wife, must be determined by her conduct prior to the decree, and that with such determination all power to inquire into it, as affecting the question of such alimony, is at an end. (Bishop, §§ 623 *c*, 630.)

In some States, the Courts, by statutes, have a discretion, when they deem it wise, to make her an allowance, although the divorce is granted because she is the guilty party. There are several reported cases in which an allowance has been made to her under such circumstances. Bishop, § 561, and the cases cited in notes 1, 2, and 3. 3804

My conclusion is, that when a woman is divorced from her husband, by reason of his adultery, her right to such suitable allowance as may be just, having regard to the circumstances of the parties respectively as they exist at the time the decree is pronounced, is perfect and absolute.

That it is no part of the province of the Court that fixes the amount, to watch over her subsequent conduct in life, or to take proof of it, as a ground of affecting the right to an allowance or its amount. 3805

That her subsequent misconduct no more impairs her right to it, than such subsequent misconduct would impair her right to dower or to a distributive share of her husband's personal estate, if he had died intestate, and no divorce had been pronounced.

That whatever may be the power of the Court, under particular statutes, or in the absence of any statute, affecting the question to enlarge or diminish the amount, subsequently, by reason of an improvement or loss of the faculties (the property) of either or of both of them, the allowance is to be fixed in view of all the circumstances proper to be considered, as they exist at the time the decree is pronounced. 3806

How she spends it, no more concerns the former husband, or the Court, than the manner in which any other woman may spend the like sum ; whatever feeling he may be supposed to have in the matter, in judgment of law he stands in the same position to her as to any other unmarried woman in society.

Her subsequent good or ill conduct can be made to affect her only as the same conduct would affect other individuals. There is no law by which her misconduct,
 3807 whatever it may be, can be punished by a forfeiture of part of an allowance, just in itself when fixed, and adjudged to her by reason of her husband's violation of his legal duties to her, nor by which her subsequent meritorious conduct can be rewarded by an increased allowance at his expense.

I think, therefore, that the order appealed from was properly granted, on the ground that the facts sought to be proved are inadmissible in evidence on the pending reference.

Whether the pending motion should have been denied, for the other reasons assigned by the Judge who
 3808 made the order appealed from, it does not become very important to consider further, if the conclusion last expressed be correct.

The opinion delivered, in support of the order in question, proves quite conclusively, that the defendant is not entitled, as a matter of strict right, to the commission which, by statute, may be issued "to take testimony in any cause depending in the Court of Chancery" (2 R. S. 180, § 84 [78]); or "in a Court of Law, being a Court of Record," in an action in which "an issue of fact shall have been joined" (*id.* 393, § 19 [sec. 11]); or in which "an interlocutory
 3809 judgment shall have been obtained" (*id.* 396, § 32 [sec. 24]); even though some of the matters offered to be proved were relevant and material.

The allegations of extravagance, as immaterial, and of intemperance, as too vague and indefinite, are no justification to the Court for subjecting the plaintiff to any delay in the proceedings upon the reference.

The previous history of the action entitles the plaintiff to some consideration in respect to her alleged fornication, and vicious mode of living while in California, even though proof of them might be material. The pleadings, verdict, bill of exceptions, and the judgments 3810 of the Special and General Terms of this Court (upon which, in part, the order appealed from was made), show that she was charged by defendant's answer in this cause with acts of adultery with various persons, who were named, as well as with persons to the defendant unknown, and that, after a trial almost without a parallel, as to its length, a jury determined that each and all of those charges were untrue.

The alleged acts of fornication, now sought to be proved, were committed, if at all, in California, between May, 1853, and April, 1856; more than three years had elapsed, after the plaintiff left California, before the motion was made which resulted in the order appealed 3811 from.

The plaintiff denies, in the most unqualified manner, that she has been guilty of any misconduct, of the character in question.

The defendant does not, in his petition, name any person with whom (as he has been informed) the plaintiff has committed fornication, nor any person, as one who will testify to any specified facts, which, if uncontradicted, would tend to show that she had been guilty of such misconduct.

He states, it is true, "that he has derived information of acts of intemperance, immorality, fornication, and 3812 adultery on the part of said plaintiff, during the period referred to, from statements made by witnesses

thereof in some instances, and from careful inquiries as to facts which were within the knowledge of other witnesses, and could and would be testified to, if the testimony was required or compelled."

He also states, in respect to the seventy-five witnesses named in his petition, that they "are, and each of them is, as your petitioner is advised by his counsel, hereinafter named, and believes, a material and necessary witness 3813 for the defendant in the further defense of this action, and on the hearing before the said Referee; that your petitioner has stated to John Van Buren, Esq., his counsel herein, who resides in the city of New York, the facts "which he expects to *prove by each* of said witnesses; and that he is advised by his said counsel, and believes that each and every of said witnesses is material as aforesaid."

"That among the witnesses hereinafter named" (in the petition) "are several, whom your petitioner is informed and believes have had criminal intercourse with 3814 the said plaintiff."

But the petition does not designate any of them, as the persons with whom such misconduct has been committed, nor detail any of the facts which were stated to defendant's counsel as the facts which he expected to prove by either of the witnesses.

Allegations of conduct of such character as is here imputed to the plaintiff, if the defendant possesses any information in respect to it, entitled to any consideration, can be made more specific, and be established by witnesses, who can be named in a commission.

If they cannot be, the Court ought not, after the experience 3815 furnished by the trial of this cause, to issue a roving commission to examine, as witnesses, whomever the defendant may desire, and whose character the plaintiff may not be able to prove, although not worthy of the slightest credit in Court or out of it, in order to

prove such misconduct with persons who are not named, and at times not intimidated.

As nothing but a case of urgent necessity should induce the Court to grant a commission under the circumstances of a case like this, and in a condition such as this is, some stronger grounds for believing that the facts alleged are true should be shown, than have been established in support of the defendant's petition. 3816

It is for the reason that no such case of urgent necessity has been presented, and because allegations much more precise and specific, based on transactions alleged to have occurred in the city where both parties at the time resided, have been fully tried and found to be destitute of truth, and because of the long delay in moving for the commission, that the order appealed from should, among other reasons, be affirmed.

To justify the issuing of a commission in such a case as the present, at the time and under such circumstances as the one in question was applied for, and the 3817 subjecting of the plaintiff to any delay, or expense, in its execution, a case should be presented, free from all suspicion that any part of the motive in asking it is, to delay or annoy the plaintiff, and furnishing strong moral evidence that the facts alleged can be proved, and that great injustice would be done to the defendant, if the Court withheld the aid necessary to procure the proper evidence.

The petition and other papers on which the order appealed from was made do not, in my opinion, present such a case, and, for that reason also, the order should 3818 be affirmed.

All the other Justices concurred, except Pierrepont, Justice, who dissented from that part of the Opinion which holds, that, in fixing the amount of alimony, the immoralities and bad conduct of the wife after the de-

cree of divorce is pronounced, and before the amount of permanent alimony is finally fixed, cannot be considered by the Court.

Order affirmed.

3819

NEW YORK SUPERIOR COURT.

CATHARINE N. FORREST

agst.

EDWIN FORREST.

} CROSS MOTIONS.

I. By the Defendant, for an extension of the time within which to prepare a case or exceptions.

II. By the Plaintiff, for an increase of the allowance heretofore made for alimony, *pendente lite*, and the expenses of the litigation.

B. GALBRAITH, N. CHASE, and C. O'CONOR, *for Plaintiff.*

3820 J. VAN BUREN and J. T. BRADY, *for Defendant.*

SPECIAL TERM, DECEMBER, 1859.

WOODRUFF, *Justice.*

The time which I have taken for the consideration of these motions was not so much required by any questions of doubt or difficulty appearing, after examination of the papers submitted, as by the number and voluminous character of the papers upon which the motions were respectively made and opposed. Laying out of view the notoriety which has been given to the litigation, the freedom and extent to which its various stages have

been the subject of comment, and the bitterness of feeling which has characterized many of the papers presented by the parties, from time to time, the questions now raised are not extraordinary, and do not involve questions of novelty, or difficulty. 3821

The defendant desires to review the proceedings had on a reference involving a question of large pecuniary importance. The result of that reference, if the report of the Referee be confirmed, will require him to pay to the plaintiff a present sum of about thirty-six thousand dollars, and, in the future, an annuity of four thousand dollars. His counsel declares, under the sanction of his oath, his belief that errors have been committed on the reference, to the prejudice of the defendant, which should be the subject of review, on a proper presentation to the Court of all the proceedings had before the Referee, before the report is confirmed. 3822

The papers which must necessarily be prepared for that review are voluminous, and the counsel expresses some doubt as to the precise form in which that review is to be had.

Additional time is therefore asked, to enable the counsel to prepare the case (if a case be necessary), in order that the defendant's right of review be fully preserved to him.

I deem the application in all respects reasonable, and the indulgence sought should be granted. It is the constant practice of the Court to grant a similar indulgence, in cases of far less importance, and often when the necessity for further time is far less, and the grounds of the application of slighter force. 3823

As suggested by me on the argument, I am of opinion that this report may be reviewed, and must be reviewed, in conformity to the thirty-second of the rules of Court, on exceptions, and that no other "case" is necessary than copies of the report of the Referee, and

3824 the testimony taken by him, and proceedings had before him, as detailed in the papers annexed to such report, and a copy, also, of the defendant's exceptions. But I do not deem it my duty on this motion to decide that question, either to relieve the counsel from the responsibility of taking such course as they may deem regular, or to endanger the defendant's rights, by deciding, in advance, a question not necessarily involved in the motion before me, especially since, if I should by such decision deprive the defendant of the means of a full review of the decisions, by which he alleges he has been aggrieved, it might, perhaps, be impossible at a
 3825 future day to repair the mischief, if I should fall into any error, by acting on the opinion above expressed. If he should prepare a case, and it should be deemed irregular, and be set aside on motion, he will have lost no rights—while if I deny him time he may be remediless.

I may, no doubt, safely assume that the defendant's attorney has been reasonably active and industrious since the Referee's report, and if so has had already twenty days since the report was filed for the preparation of his papers therein; an additional twenty days will, no doubt, be sufficient within which to determine whether
 3826 a formal case is necessary, and to prepare it or complete its preparation; and the order will give him twenty days from the 2d day of January, and provide that the plaintiff's proceedings be stayed, unless the Court at Special Term should sooner decide to hear the cause under the 32d rule, or in conformity to the order by which the reference was directed, without any case being made other than a copy of the report and accompanying proofs, &c., and the defendant's exceptions, in which event the stay of proceedings shall cease, so as to permit the cause to be heard on the report and the exceptions thereto. If the stay of proceedings be not so terminated, it shall continue until the case, if duly made
 3827 and served, shall be settled.

II. In relation to the plaintiff's motion for a greater allowance by way of alimony, I do not deem it proper, on the mere ground that the Referee has determined, on the evidence before him, that four thousand dollars a year is a reasonable and proper sum for permanent alimony, to adopt that report before it has been confirmed, and while it is claimed by the defendant, under the advice of his counsel, to be liable to exception for grave errors, and require the defendant to pay that amount while the report itself is undergoing the review which the defendant is entitled to.

Until final judgment, any order for alimony should, I 3828 think, be governed by the rules usually regulating the temporary provision, which is clearly and palpably just, whatever may be the sum finally awarded. Were I now to adopt the finding and report of the Referee, I might, with propriety, be said to have confirmed it *pro hac vice*, in advance of the action of the Court upon it, and without a hearing of the defendant upon his objections to the report.

On the other hand, it is quite clear to my mind, that, it being finally settled in this Court that the plaintiff is entitled to her judgment of divorce and to alimony, on the ground that her husband is guilty, and that she is 3829 innocent, if I could certainly know at this time what sum would be finally awarded, it would be my duty to allow her that sum; else a premium would be offered to the defendant, as an inducement to delay the final order to the utmost of his power. But it is impossible that I can be so assuredly informed.

It is, however, equally clear that, though I can have no such certain knowledge, I am bound, if the pecuniary circumstances of the defendant are such as to warrant it, to see that the plaintiff is reasonably and comfortably provided for until the permanent provision for 3830 her shall take effect: and that this is not unjust to the

defendant, is too plain to require discussion ; for, if he were wholly innocent of the charges made against him by the plaintiff, he is bound to make that provision ; and his having been found guilty by the verdict of an impartial jury, on a full and fair trial, cannot render the obligation any less.

Upon consideration of the affidavits on the part of the plaintiff, and taking the defendant's own testimony before the Referee as a guide to the amount of his estate, 3831 I cannot avoid the conclusion that the provision now made for the plaintiff is inadequate. The aggregate of his estate he first states to be \$260,000. He afterwards states that the aggregate is \$176,800 ; and his explanation of the difference shows that he has, since this suit was brought, given large amounts of property to his sisters, or purchased and paid for large amounts of property which he has caused to be conveyed to them. Now, without assuming that the defendant is earning any thing by his own personal exertions, and requiring only that he obtain a reasonable income from the property he has accumulated, and even recognizing the gifts to his sisters (which, so far as the plaintiff is to be affected thereby, 3832 ought not to be taken as a diminution of his means to her prejudice), it is plain that she is now entitled to receive, even as temporary alimony, at least three thousand dollars a year, and he is entirely able to pay it. I am not considering the question of permanent alimony, upon the whole evidence before the Referee, and in naming three thousand dollars I am not intimating any opinion on the question whether the report of the Referee is right or not ; but conceding that temporary alimony ought to be fixed at a sum clearly within the limit allowable in fixing permanent alimony, the sum of three thousand dollars a year is moderate with reference 3833 to his means and her necessities.

The plaintiff, by her motion, asks for a further sum for expenses and counsel fees ; but she has not shown

that the moneys provided for such expenses and fees, by the order of July last, have been expended. Fifteen hundred dollars were directed to be paid, and were, it may be presumed, paid by the defendant.

The plaintiff states that for expenses of the reference, other than counsel fees, she has paid out upwards of five hundred dollars. It is true that the Court might presume that she has also paid the balance, or a great portion thereof, to counsel, if they have been fully paid for the conduct of the reference, the proceedings upon 3834 which have been produced on this motion ; but it is not so stated, and I prefer not to indulge in conjecture on a subject where the truth might so reasonably have been shown. If she has one thousand dollars, or thereabouts, unexpended, she has no present need of more, unless nor until she has been required to pay it, and if she has paid it to her counsel she can easily state it. It will be time enough to make an order when she shows its necessity more distinctly, and for money for expenses of the litigation she can apply at any time.

The direction as to the alimony will be, that it be paid in monthly sums of \$250, instead of \$200, as directed in July last.

Costs of the motion will abide the final disposition of 3835 costs in the action.

N. Y. SUPERIOR COURT.

CATHARINE N. FORREST

against

EDWIN FORREST.

SPECIAL TERM, MAY, 1860.

CH. O'CONOR, *for Plaintiff.*J. VAN BUREN and JAS. T. BRADY, *for Defendant.*MONCRIEF, *Justice.*

- 3836 The defendant, in the exercise of his legal right, in my opinion, should be left to the mode provided by law, if he desires to stay proceedings pending his appeal. No reason has been discovered by me why the proceedings should be stayed without giving security to protect the rights of the plaintiff, as established by the judgment. The fact that the Court of last resort has reversed some decisions upon appeal, or of eminent counsel certifying their belief that error has been committed, or the allegation under oath, of the defendant, that he believes great and constant injustice has been done to him, upon and ever since the trial (in 1851), form no good ground for taking the case out of the general rule. There is nothing novel or extraordinary in such views being entertained, as probably they are, by or on behalf
- 3837 of every unsuccessful suitor.

It must be assumed that a full examination of the case was made, the law applicable thereto ascertained, and after due deliberation judgment was given in accordance with law ; the legal presumption is that the decision of the Court, as pronounced, is right.

The counsel for the plaintiff insists that the defendant is required, and, under the circumstances of the present case, should be held to a strict literal and technical com-

pliance with the requirements of the Code, and furnish 3838
 an undertaking with only and but *two* sureties. Section
 338 requires *two* sureties, to stay proceedings upon an
 appeal; the language of the other sections (334, '5, and
 '6) calling for at least *two* sureties.

While the defendant may not be entitled to any indulgence or favor, or receive any aid in his effort to reverse the judgment rendered against him, I am yet constrained to differ from the learned counsel. In my opinion it would not be just to deprive him of the right to stay proceedings pending his appeal (practically rendering it ineffectual), by restricting him to the production of two sureties and requiring, as the law does 3839 (§ 341), each surety to justify in double the amount of the undertaking. It must be apparent that, with very few exceptions, even among the most wealthy of our citizens, some difficulty must arise in procuring two persons of sufficiently large means to become sureties in the very large amount which will be required.

No injustice can result to the plaintiff by permitting the defendant to give the undertaking with *three* or *four* sureties to justify in sums which, in the aggregate, will be equal to two sureties in double the amount of the undertaking.

3840

7 Paige Rep., 608.

Such a practice prevailed in relation to special bail, where the sum was large.

1 Wendell Rep., 107; 1 Sellon, 159.

1 Arch. Pr., 86; 1 Chitty's R., 601.

2 Crompt. & Jervis Rep., 173.

An order will therefore be entered, allowing the defendant to give the undertakings with *three* or *four* sureties, and in all other respects denying the application, with ten dollars to the plaintiff, to be paid to her attorney before or at the time of entering the order. 3841

NEW YORK SUPERIOR COURT.

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| CATHARINE N. FORREST, | } |
| Respondent, | |
| <i>agt.</i> | |
| EDWIN FORREST, | |
| Appellant. | } |

Heard General Term, October 1861.

Before WOODRUFF, MONCRIEF and ROBINSON, JJ.

N. CHASE and C. O'CONOR for *Respondent*

H. W. ROBINSON and J. T. BRADY for *Appellant*.

Decided December 7, 1861.

By the Court—WOODRUFF, Justice.

On the thirty-first day of January, 1852, a judgment was rendered in this Court, dissolving the contract of marriage between the parties to this suit.

On the defendant's appeal to the General Term, that judgment was, on the twenty-fourth of July, 1856, and upon a review of all the proceedings theretofore had in the cause which such appeal brought before the Court, duly affirmed, except so far as it fixed the amount of alimony to be paid by the defendant, and the times and manner of payment, the security to be given therefor, and the conditions thereof, imposed on the plaintiff.

And it was thereupon directed that it be referred to Alvin C. Bradley, Esq., to inquire and report what would be a suitable allowance, and at what times, and in what manner it should be paid, and what security for the payment of the allowance would be reasonable. The Referee was directed to report the facts found, with his opinion thereon, and all proofs received, and any rejection of proof offered.

The reference has been had ; the report of the Referee has come in, containing the facts found, the opinion of the referee, the proofs taken, and a statement of whatever evidence was rejected.

The case was thereupon brought to a further bearing, and, on the twenty-first day of May, 1860, all exceptions to the report being over-ruled, the same was confirmed, except in one particular, viz. : that there should be allowed to the defendant, as a credit against the arrears of alimony, whatever sums he had, pending the suit, paid as temporary alimony under the orders of the Court, which allowance the Referee had not made ; and, thereupon, a final order, or judgment, conforming to the previous decision of the General Term, and the judgment there rendered, was entered, by which the defendant was directed to pay, for the support of the plaintiff, the annual sums so reported to be reasonable, and to secure such payment as recommended by the Referee.

From this final order, or judgment, the defendant has appealed, and his appeal is now before us.

It is, therefore, obvious that the only matter we have to consider is, whether that final order or judgment, entered at Special Term, on the twenty-second day of May, 1860, is erroneous.

The grounds upon which a reversal is sought may be summed up in three points:

First. That the proceedings on the reference were irregular and void, because the General Term of this Court had no power to order a reference, but should have directed a new trial, or have remitted the proceedings to the Special Term, to be there proceeded with as might be proper ; and, therefore, that the proceedings on the reference and the report of the Referee formed no proper basis for the order or judgment now appealed from.

If it were conceded that the General Term had no power to order the reference, it is not clear that such concession would entitle the defendant to a reversal of the order or judgment appealed from.

Under the statute, the Court are directed (if a decree dissolving the marriage be pronounced) to make a further decree, compelling the defendant to provide such suitable allowance for the support of the complainant as the Court shall deem just.

The cause was brought to a hearing at the Special Term, in order to obtain such further decree ; on which hearing, all the prior proceedings and proofs in the cause were produced. A report was also produced, accompanied with all the evidence bearing on that subject, which either party desired to produce, which the Court deemed admissable, taken in due form, in the presence of both parties, and taken not merely in accordance with such order of the General Term, but in pursuance of an order of the Special Term itself, made July 22nd, 1859, by which the Referee was directed to proceed in the said reference (which latter order may, if necessary to meet an objection purely technical in its nature, be regarded as an adoption of the order of reference made by the General Term). Besides, the evidence taken before the Referee, and upon which the action of the Special Term, in the further judgment now appealed from, was based, appears to have been taken by him, without any objection from the defendant, or any suggestion that the Referee had not jurisdiction to take the testimony. Such testimony was taken at great length on both sides, as well on behalf of the defendant as the plaintiff, and the defendant (independently of the confirmatory order of the Special Term, already alluded to) may well be held to have acquiesced in the reference, and to have waived any objection thereto. If any suggestion had been made by the de-

fendant, that the direction of the General Term was not in all respects regular, the plaintiff could readily have obtained at Special Term a distinct order for such reference, and, before proceeding in so protracted and expensive a reference, have obviated this technical objection.

The statute does not prescribe the formal manner in which the Court shall, on the application for the further decree, possess itself of the facts necessary to guide its judgment, and mere irregularities in the proceedings, if no injustice has been done, and technical objections, going to the manner in which a reference has been initiated, should not be permitted to influence the Court on such further hearing, or prevent the use, on such further hearing, of testimony fairly taken and reduced to writing, or the opinion of a referee, honestly based thereon. There would seem, in strictness, no inevitable objection to the use even of affidavits on such further hearing, although the usage of the Court to resort to proofs, formally taken by examination and cross-examination, may be the safer and better practice. But we think the objection itself has no foundation; that there is not even a technical defect or irregularity.

On the appeal to the General Term from the original judgment, the order to be made would depend upon the extent to which, in the opinion of the Court, errors had affected that judgment. If errors had been committed on the trial of the issues ordered to be tried by a jury, which so affected the result that the Court were not willing to proceed to judgment thereon, a new trial would be necessary. But even there we apprehend, the Court were not required to grant a new trial, merely because it found on the record some exceptions which were well taken, if satisfied, upon the whole case, that justice had been done. This case on the part of the defendant, upon the former appeal to the General Term,

and on the present appeal, has been treated and considered as though exceptions, if well taken, were to have the effect of reversing the judgment, however technical or unimportant to the general result they may be. Such effect was not to be given to mere errors, on the trial of a feigned issue out of Chancery, and it is not apparent that the Code has introduced a new rule on this subject (*Forrest vs. Forrest*, 6 Duer Rep., 138, 139; *Barker vs. Ray*, 2 Russ Rep., 63; *Lyles vs. Lyles*, 1 Hill Ch. R., 82; *Mulock vs. Mulock*, 1 Edwards Chy. R. 14, and cases cited; *Apthorp vs. Comstock*, 2 Paige Rep., 482, and cases cited); and the observation, gathered from these cases, that the trial of issues, and much more the proceedings on the reference, being to inform the conscience of the Court, even the rejection of competent testimony, or the admission of incompetent evidence, does not necessarily require the Court to set aside the proceedings, or grant a new trial, may properly be borne in mind, in considering the objections hereafter to be noticed.

To recur to the specific point under discussion; The General Term were of opinion that no such errors had been committed as should affect the verdict of the jury upon the questions properly submitted to them, or the judgment of divorce pronounced thereon, and that judgment was therefore affirmed. But in one particular, complained of by the defendant, the judgment was not deemed proper, and this gave the opportunity, and required the Court in General Term to exercise the power, clearly given by section 330 of the Code, to reverse, affirm, or modify the judgment appealed from, and, if necessary, to order a new trial. The order of reference made by the General Term was not therefore an assumption of original jurisdiction to entertain motions in the first instance; a judgment directing the payment of permanent alimony, as provided in the statute, conse-

quential upon the granting of the divorce, was before them on appeal, and on reversing that judgment (or, as it is called in the statute, that further judgment or decree), it was entirely competent to modify the whole judgment in the action by reversing this *further judgment* and directing a reference to ascertain the facts—i. e., to do what, it was considered, the Court at Special Term (instead of making the further judgment or decree) should have done.

The order in this respect is analogous to the granting of a new trial on the main issues, if that had been necessary; to the power, almost daily exercised (on appeal from judgment on the reports of referees appointed to hear and determine all the issues, if the judgment be reversed), of discharging the order of reference, and ordering a new trial before a jury; to the power to require a respondent to abate erroneous allowances included in his recovery, and, on his consenting to do so, affirming the judgment as to the residue. The Court of Appeals, in a recent case from this Court, have, we think, gone much further than was done, in the present case, by the General Term. They affirmed the judgment in part, and, without reversing any part of the actual determination made, directed this Court to proceed, by reference or otherwise, to ascertain further facts, and to give judgment according to the result of such further inquiry. This will at least serve to show the power of the Court on appeal to make such direction or order as should have been made by the Special Term.

Mason vs. Ring,

Term, 1861.

We have no doubt of the power of the General Term to make the order, and that the reference was therefore regular, and the proceedings before the Referee were properly before the Special Term on the hearing. The idea suggested, that the General Term should remit proceedings, on reversal, even in part, to the Special Term,

to be proceeded in, has no just application to proceedings at all times before the same Court, and independent of the section of the Code to which reference has been made (§ 330,) it is most in accordance with our view of the powers of the Court and with sound reason to say that, on reversal of a judgment in a matter which belongs to the equity jurisdiction of the Court, if a reference be proper, the General Term may direct it. A case would illustrate this, which, we think is clear and which goes much further than the one under consideration: For example, on a bill for an accounting, brought by an alleged partner, suppose the judge at Special Term should decide that the defendant was not liable to account and order judgment in his favor; on appeal from the judgment, the General Term are of opinion that upon the facts found (there being in the case no exceptions, except to the conclusion of law from those facts), the plaintiff was entitled to an account, we think it clear that the General Term not only might but must award judgment in favor of the plaintiff, and that the defendant account, and in such case, under subdivision 2 of section 271 might, of its own motion, direct a reference for the taking of such account.

In deference to the suggestions made on the argument of this appeal, we have presented these views. Others might be suggested, but, in leaving this point, it is proper that we should say that, if we deemed it doubtful, we should question the propriety of sustaining the objection that the General Term had no power to make the order. It was made. No doubt it was made upon full consideration, and if in any case it be proper that one General Term should disregard a decision of a prior General Term, when relied upon as an *authority* or *precedent* in support of a rule of law or practice, we are not aware of any instance in which one General Term has assumed to reverse an order of a previous General Term, and that is practically what we are called upon to do

in this case. For, suppose we were now to sustain this objection, what would be the effect of our decision reversing the judgment appealed from? The order of the former General Term would stand, it is true, on the record; but, if the plaintiff proceeded again to execute it, our decision would be invoked to show that it was made without power.

While, on the other hand, if the plaintiff attempted to proceed with the cause in any other manner, the unrevoked order of the General Term would forbid. Such conflict between two General Terms, or their orders touching the same matter, in the same cause, should not be permitted.

Second. The grounds of reversal, relating to the rejection of evidence, on the hearing before the Referee, and for which, under several points or heads, the defendant urges his appeal, have, we think, all been disposed of by the previous decision of this Court, in July, 1859, on the defendant's motion for a commission to examine witnesses in California, and on the appeal from the order denying that motion.

Forrest vs. Forrest, 3 Bosw. R., 670, 687, et seq.

It is true that the Court, both at special and General Term, were of opinion that there were other sufficient reasons for refusing a commission, than the inadmissibility of the evidence sought to be obtained; but that question was discussed at great length; it was deemed of great importance to the then pending reference, and it was deliberately considered and decided.

The counsel for the defendant, does not, we think, expect us to disregard that decision, although he very properly takes the position that it was erroneous, in order that he may have an opportunity to insist upon it as error, if it should be desired to review this judgment in another tribunal.

Upon an examination of all the exceptions mentioned in the points of counsel, to rulings of the Referee rejecting evidence, they seem to us to be covered by the decision referred to. The evidence proposed had reference to the conduct, reputation, associations or habits of the plaintiff since the decree for a divorce was pronounced, and although it suggested that the answers to some of the questions bore upon the inquiry, What is her station or position in society? they have regard, not to the station or position in which she had been accustomed to move prior to that judgment, and in which it was the duty of the defendant to sustain her.

Third. The remaining point embraces the amount allowed for alimony, and the time from which it should be computed and allowed.

It is here also proper to suggest, that the report of the Referee and the proceedings had before him were rather advisory than conclusive. The Court could and did look over the whole subject, with all the light thrown upon it, by any or all the proceedings laid before them. These included as well the testimony taken before the Referee and his opinion, as also all the proceedings on the trial, and the other proceedings recited in the order now appealed from; these latter appearing to have been produced and submitted by the defendant himself.

If, therefore, the opinion of the Referee were liable to the criticisms suggested on the arguments, or even if there were errors committed before him, a reversal does not necessarily follow.

This is said, not as the expression of a dissent from the Referee, but for the purpose of stating the broader question, which is in truth before us, upon the whole case as disclosed by the papers before us—Is the allowance of alimony too great, or is it computed from too

early a day, so that we ought to reverse the judgment appealed from? We think not.

If this case furnished any occasion for the suggestion, we might with propriety say that the deliberate judgment of the Court at Special Term, on the question above stated, ought not to be reversed, unless very clearly wrong. But here we fully concur in the views by which the Court was there governed, and think that the discretion of the Court was properly exercised.

It is said that undue importance has been given to the defendant's ability to pay, and that the judgment is rather a partition of his income than an allowance reasonably required by the plaintiff.

We do not deem it necessary or profitable to review all the evidence on this subject, or discuss in detail all the reasons which might be assigned for the allowance, still less to analyze or review all the cases in which the principles governing the subject are stated.

It is clear, that whatever sum is proposed as an allowance, must be within the ability of the husband to supply. The ability of the defendant is a primary inquiry, and its importance cannot be exaggerated.

It must also be so clearly within his ability that his own means of living should not, by the allowance, be unreasonably reduced. His ability, in this aspect, is of first importance.

His ability being found, or conceded, then the inquiry, What is suitable for the plaintiff? may be considered without any restriction arising from fear of injustice to the defendant.

It may, for the purposes of this case, be conceded, that this provision for the wife never ought to exceed one half of the income of the husband; and yet, if it be necessary, in considering the husband's ability to provide

suitably for the plaintiff, his profession or occupation, and his annual income derivable therefrom, may properly be taken into the account.

So it must be conceded that one-third of the husband's income may, without hesitation, be taken, if that be reasonably required to make suitable provision for the plaintiff, and the husband cannot with propriety insist that the allowance of such one-third is extravagant.

Again : Voluntary dispositions made by the defendant of his property, or any parts of it, pending the litigation, ought not in any degree to prejudice the plaintiff, or reduce the amount of her allowance—especially, if, notwithstanding such disposition, he is still able to pay it, and even though his giving away his property makes the proportion of present income allowed to her greater than might otherwise be proper.

To suffer her to be so prejudiced, would furnish to a husband, embittered by the proceeding against him a temptation voluntarily to impair his own ability to support the plaintiff.

And when it appeared as it did by the proofs in this case, that, although the defendant has parted with the apparent title to a very large amount of property, he still has the practical management and control of it according to his pleasure, such disposition of his estate is entitled to little, if any, weight in the consideration of the question.

We are quite satisfied with the view taken by the Referee, that, considering the situation of the plaintiff before the misconduct of the defendant, the manner of life to which she was accustomed, the just expectations entertained by her, the prosperity which she was entitled to share with the defendant, and her claims upon

him for the comforts and indulgences to which she was entitled as his wife, and which, as a kind and faithful husband, he must have yielded; and considering, further, the necessary expenses of living in a style in some degree corresponding with that which she was entitled to share with him, the sum of four thousand dollars per annum is not unreasonable.

And the amount of the defendant's estate justified the allowance of that sum. If the voluntary dispositions made by the defendant, pending the suit, be taken into view, that estate considerably exceeds two hundred thousand dollars; and it was shown that his income from his profession for several years past has exceeded twelve thousand dollars per annum.

No hardship is imposed upon him by the allowance in question. The discussion of this subject, in Bishop on Marriage and Divorce, (chap. 29, pp. 604 to 621,) fully sustains the provision here made, and the authorities cited in its support seem to us quite conclusive.

In respect to the time from which the allowance is computed, it is to be observed that, whatever the defendant has paid, under the order of the Court, for alimony *pendente lite*, was allowed to him by the Court at Special Term.

It is settled in this State, by the Court of last resort, that the allowance of permanent alimony may, in the discretion of the Court, depending upon the special circumstances of the case, be made to commence from the filing of the bill of complaint (*Burr vs. Burr*, 7 Hill Rep., 208); and Chief Justice Nelson says, in reviewing that branch of the decision of the Chancellor (10 Paige Rep., 37, 38), "It was hardly insisted upon as involving any question of law;" and Senator Strong (at p. 222), says, unless the allowance from the filing of the bill clearly indicates an abuse of judicial discretion,

it does not appear a sufficient ground for a modification of the decree, and, further, that it tends to the ends of justice.

It is not necessary, if, indeed, it be proper, for us to enter upon a discussion to show the propriety of our following the decision of the Court of last resort in our State.

It is proper to say, however, that there seems to us an evident propriety in taking the date of the commencement of the suit as the period of the allowance, where, as in this case, the litigation, without fault on the part of the plaintiff, has been protracted through so many years ; during a great portion of which the plaintiff was left by the defendant wholly without assistance from him, either for the expenses of the litigation or support for herself.

To the suggestion, that the accumulated sum is large the answer is obvious : if the facts now ascertained and fixed by judgment could have been certainly known and the course of judicial proceeding had been such that it was possible so to adjudge, the plaintiff, on the very day she filed her bill, was entitled to the annual sum now allowed to her. The defendant suffers no wrong by having been permitted to retain the money through the years of litigation during which the plaintiff has struggled, and, presumptively, he has made the possession of those moneys largely useful. He is not charged with interest ; and so, by that interest, he has been still enabled to make very considerable profits out of those moneys.

It can be no sound discretion which will enable a defendant to protract such a litigation, or offer him a premium to induce him to protract a litigation, by postponing the date of the allowance of alimony, and save to him the amount which should accrue to the plaintiff

in the mean time ; and yet, by not charging interest, that result follows in some degree in the case before us.

We feel no disposition to enhance the defendant's profits still further, by giving to him all the principal of such allowance, which, upon the rule for which he contends (if the allowance were only to begin at the date of the decree fixing the rate of such permanent alimony), would be saved to him by the delay.

The Referee, in his opinion, accompanying his report, has discussed the question submitted to him with eminent ability and with great fairness ; and subject to the slight modification made on the hearing at Special Term, we see no just ground for withholding our concurrence in the result at which he arrived. The Court at Special Term, upon consideration of the whole case, and in the exercise of the discretion by which the subject was necessarily to be governed, deemed the modification (which was favorable to the defendant) proper, and otherwise concurred in the conclusion of the Referee.

We think the judgment appealed from should be affirmed.

Ordered accordingly. Judgment affirmed.

NEW YORK SUPERIOR COURT.

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| CATHARINE N. FORREST,
Respondent,
<i>agst.</i>
EDWIN FORREST,
Appellant. | } |
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Heard General Term, October, 1861.

Before WOODRUFF, MONCRIEF and ROBERTSON, JJ.

H. W. ROBINSON and JAS. T. BRADY for *Appellant*.

C. O'CONOR for *Respondent*.

Decided December 7, 1861.

ROBERTSON, *Justice* :

All the questions raised on the present appeal were disposed of by this Court at General Term, on a former appeal, except those which relate to the duty of this Court, at a General Term, to award a new trial for the improper admission of testimony, its power to order a reference, and the amount of alimony allowed, including the period for which it was allowed.

It is claimed in the case, that evidence having been admitted upon the trial of the issues therein, which was irrelevant to such issues, and only material to the question of alimony, and exceptions having been taken to the admission of such testimony, the Court, at Special or General Term, should have awarded a new trial. I am satisfied with the reasoning in the opinion of the Court upon the present appeal, which distinguishes between the trial of issues in an action generally, and the trial of special issues in an action for a divorce, and am convinced that the Court has a discretion in the latter case not to order a new trial, for the admission of irrelevant evidence, where it can be seen that no prejudice can

ensue to the party objecting. I feel also equally satisfied with the reasoning of the Court, in such opinion, as to the power and jurisdiction of this Court at General Term, on an appeal from a judgment for alimony, to substitute therefor an order of reference to a referee to ascertain and report it, being the order that ought to have been made at Special Term.

Upon the question of alimony, minute details of the style of living and means of the parties seem to have been entered into before the Referee, and he appears to have been guided by fixed rules in determining the amount. By the report and the testimony in the case, the value of all the defendant's estate, both real and personal, at the time of the report, was nearly two hundred and seventy thousand dollars; this included unproductive real estate, valued at fifty-six thousand dollars, and other real estate, whose income was not proved, valued at about forty-five thousand dollars, which included his residence and an adjoining lot, valued at thirty-eight thousand dollars, and of which but one piece, worth eight thousand five hundred dollars, was proved to be productive, and no testimony was given as to the productiveness of the rest. That valuation of his estate also included personal property not proved to have been productive, valued at thirty-two thousand dollars, consisting of a library, presented to his sisters since the judgment in this cause, books, pictures, bank stock, interests in a hotel, theatre and ship; bonds of a debtor, amounting to fifteen thousand dollars, and two thousand five hundred dollars in cash. The only amount of income proved was about eight thousand two hundred dollars. The payment of the principal of about thirty-seven thousand dollars of the defendant's personal estate, consisting of bonds and mortgages, taken on the sale of real estate, is postponed until the plaintiff's right of dower is extinguished. The defendant, by

his profession, earned at one theatre, fourteen thousand dollars a year, for the five years succeeding the judgment in this action ; having also performed in others.

The principles which keep the amount of alimony within certain bounds still leave a large latitude for discretion (Bishop on Mar. and Div., §§ 619, 617, and 618 to 623, § 619, *a*, §§ 623, *c*, 630). The learned and able Referee, in the well-considered and eloquent exposition accompanying his report, discloses the rules by which he was guided, and his reasons therefor. He assumed as a basis, that the support to which a wife was entitled, upon a divorce, was her common law maintenance, retained as an obligation on the husband's part, notwithstanding the dissolution of the marriage tie ; he also assumed, that the circumstances of the parties, which are to regulate the amount of such support, varied with the persons, their stages of life, characters, conditions, and places of abode ; he also held, that the standard for such support of the wife was governed by the style of living, established by the husband previously ; that, on the one hand, it does not necessarily consist of mere food, clothing and shelter, and that other matters which determine the position of a family enter into its composition ; and, on the other, does not include indemnity for the loss of the husband's society, endearments and affection, although she had a right to expect them ; that it may *fluctuate with the increase or diminution of the husband's fortune, even after the judgment in the action*, and, *therefore, the increase in this case may be taken into consideration in determining it* ; that the value of all property belonging, *although unproductive*, may be taken into consideration, also, if not unsalable ; and that, in estimating such value, any incumbrance, such as the wife's right of dower, may be taken into view ; and that the extreme limit of the share of the husband's income

to which the wife is entitled, in case of gross misconduct, is one half.

The Referee, in estimating the arrears of allowance since the beginning of this action, took the sum of four thousand dollars as an average annual sum, awarding, in all, the sum of about thirty-six thousand dollars, and specified the same yearly allowance for the future. In doing so, he had regard primarily to the previous intended style of living of the parties, as indicated by the expenditure of upwards of ninety thousand dollars on a mansion for a residence, and, next, to the expenditure by the defendant of an income of over two thousand dollars annually since the divorce, making due allowance for the dependence upon him of his sisters for support. In calculating the amount, he considered himself entitled to go back to the commencement of the suit, both because sustained by authority, and that was the beginning of the jurisdiction of the Court to determine what it should be; he also took into consideration that the plaintiff's expenses in the litigation would absorb not only the sum awarded, but other sums heretofore paid to her by the defendant. This allowance the Referee holds should not be accompanied by any condition of remaining single.

The counsel for the defendant contends that the support to be allowed the plaintiff is to be simply a reasonable amount necessary to pay for the *clothing, washing, food, dwelling-place, medical advice, pew rent*, and the like, and the *ordinary interchange of visits with her friends suitable to her age and station in life*, and that she is not to be furnished with even money for charity; that the husband's estate is to be considered only so far as to ascertain if his means will enable him to pay it, having reference to other claims. Various cases were cited upon this last point—*Purcell vs. Purcell* (4 Hen. & Munf. R., 507), where one-third of the husband's estate was

refused, and a *suitable* maintenance only was awarded; *Logan vs. Logan* (2 B. Monr., 142), where so much only was allowed as should maintain the wife *in decency and comfort*; *Lynde vs. Lynde* (4 Sandf. C. R., 373), in which the words were, "to support her *reasonably*, having regard to her necessities;" *Rose vs. Rose* (11 Paige R., 166), where alimony was refused altogether, unless the wife would abandon a previous settlement made by her husband, of half of his property, upon herself and two children; *Sanford vs. Sanford* (5 Day R., 353), which allowed one-third of the husband's estate, and *Thornbury vs. Thornbury* (4 Litt., 251), where the share given by the Statute of Distributions of the husband's estate is taken as a standard. I apprehend *the indefinite terms used in such decisions do not throw much light upon the subject*, and need as much interpretation as "support, having regard to the circumstances of the parties," in our statute, and that the sum allowed in this case would not amount to the portion of the defendant's estate or income mentioned in some other of the cases cited. The income of the defendant for five years after the judgment in this case, including his professional earnings, exceeded annually twenty thousand dollars; and no one can doubt that, taking the valuation given as the real value and after deducting one-third of that, as the value, of the plaintiff's dower, the remainder would yield exceeding twelve thousand dollars per annum, even if the defendant neglected to avail himself of that source of wealth, his professional abilities. I do not think that we are to be bound by the rigid rule claimed by the defendant's counsel, but that something of the latitude adopted by the Referee is justifiable, upon the grounds expressed by him, which are in consonance with the views expressed by this Court at General Term, when the appeal from an order refusing a commission was before it.

The defendant's counsel, however, also contends that

even if the rule as to the amount of support is to be relaxed, and it is to be governed by the style of living adopted by the parties, it is to be regulated by that which was adopted before the building and fitting of the costly mansion before mentioned, the benefits of which she abandoned by an agreement for a voluntary separation and the acceptance of the sum of fifteen hundred dollars as a support. I am unable to perceive why the Referee was bound to go back to the early and more frugal mode of life of the parties as a standard, if, from a well-founded and afterwards realized expectation of an enlarged income, the parties made preparations for a mode of life adapted to its expenditure; nor why a compromise of domestic quarrels should be made to affect the standard of indemnity for a wrong, when the rights which were assailed thereby were not relinquished by such compromise; besides this, the standard must have been their joint mode of life, not their separate modes of living.

It is also urged on the part of the defendant, that the Referee has not taken into consideration the plaintiff's ability to earn a maintenance. I do not understand that it is apparent that he had rejected this consideration. It is true, for the purpose of showing that such capacity is no defense to an allowance for alimony, he states that the defendant had no interest "in her acquisitions after the divorce," and is "a debtor for the allowance." But, if he had, it would not have been erroneous. If the mode by which she earned her livelihood was unsuited to the standard of social position created by the defendant, she would not be bound to practice it. As his wife, he had a right to the legitimate exercise of her talents to increase their common stock, but, never having chosen to exact it, and keeping her aloof from it, he has no right now to insist upon her employing her abilities in a way she never did while his wife, merely for the

purpose of diminishing the amount which she is to receive from him. Such a consideration is entirely distinguishable from that arising from the possession of means by her. Besides this, the defendant's ability to increase his income for the future, from his professional exertions, does not seem to have been considered, otherwise the amount to which she would have been entitled would be greatly increased. If that be so, there is still less reason for deducting her possible earnings.

The case of *Burr vs. Burr* (10 Paige R., 38 ; S. C. in Error, 7 Hill Rep., 208) settles fully the power of the Court in all cases, and the right of the plaintiff in most cases to permanent alimony from the commencement of the action. The reasons assigned in that case, as well as those given by the Referee in this case, seem eminently proper. Until the guilt of the defendant is established, all the plaintiff has a right to require is temporary alimony and provision for her expenses. When, however, it is established, it relates back and determines rights which became vested the moment the divorce was sought, after the act which violated the marriage vow complained of was committed ; but for the necessary delay of judicial inquiry, the plaintiff became entitled to the divorce at the beginning of the action ; that, at least, was a demand of all the rights to which the plaintiff was entitled, and even at common law gave interest on the main claim in the suit as an accessory.

I do not see that the objection of the plaintiff's delay in prosecuting her claim amounts to a great deal in favor of the defendant ; he has not been charged with any interest on the yearly sums fixed as the standard of allowance for the past, and although, in fixing on an average sum, the Referee may have been influenced by an increase of the defendant's estate, even that was not unreasonable. If it could have been clearly proved, at the moment of making the decree, that the defendant

would in a few years add one hundred thousand dollars to his productive estate, and receive at least fourteen thousand dollars per annum, for five years, from the exercise of his professional abilities, is there any doubt that, if the other views of the Referee are correct, the Court would have taken those circumstances into consideration? The fact, that we are looking back upon certainty, instead of forward upon conjecture, does not diminish the duty of the Court to consider such increment. For any excess of the sum allowed beyond one-third of the plaintiff's income for the two years prior to the decree, if the allowance is not to be considered as an average, the interest on, or even such payments may be considered as fully making it up; such rebate of interest being over one-third of the amount. But, in fact, the arrears are made a gross sum, and if the whole amount does not exceed what ought to have been allowed, the report should not be interfered with. It is very clear that the sum does not amount to one-third of the plaintiff's income for the whole time, and within that limit the discretion exercised by the Referee and the Court at Special Term ought not to be interfered with. The Referee, indeed, increased the allowance by the sums paid already by the defendant to the plaintiff, which were deducted by the Court. The defendant's earnings are, of course, only to be considered as income during a certain period, to part of which, as an enlargement of her allowance, the plaintiff was entitled. Their disposition is unaccounted for, and of course they are not to be considered as an increase of the capital of the defendant's estate; they may have been absorbed in the costly residence already alluded to, or in the purchase of real estate.

Even if the value of the inchoate right of dower of the plaintiff in the real estate of the defendant be deducted, as the Referee states he took it into considera-

tion, it would not alter materially the state of things, so far as the plaintiff's amount of support is concerned ; it detracts nothing from the income of unproductive property ; does not touch the personal estate, and leaves property, capable of producing more than three times the income allowed the plaintiff. When the income may be diminished by it, the parties interested can apply to diminish the alimony. After deducting from the value of the defendant's property fifty-six thousand dollars for that proved to be difficult of sale, by reason of the plaintiff's dower right, and ten thousand dollars for library and pictures, and thirty-eight thousand dollars for the defendant's residence, there remains property worth one hundred and sixty-four thousand dollars not proved to be unsalable or unproductive. The withdrawal of forty-eight thousand dollars from his capital, for a residence and its adornments, does remove it from consideration, as part of the defendant's fortune, in considering the question of the plaintiff's support ; when brought back, it swells the amount to two hundred and twelve thousand dollars, the interest of which is fourteen thousand dollars, without reference to the value of the real estate, whose sale the dower right obstructs.

The present payment, however, of a gross sum of thirty-six thousand dollars, as a debt, presents some embarrassment, as it goes to diminish the present fortune, which has apparently had some influence in determining the amount to be allowed the plaintiff ; but this is more than made up by the amount of the allowance, being the same when the defendant's income was twenty thousand dollars, and the exclusion of the interest. It will be found by calculation, that by an account current, crediting the plaintiff, each year, with only one-third of the defendant's income, during that year, and interest, omitting any income from unsalable property,

and charging her with the present allowance and interest, the balance would be largely in her favor. There does not appear, therefore, to be on this ground such gross error, in the amount allowed, as to warrant the inference of mistake in law in fixing it.

The conclusions of the Referee, sanctioned by the judgment at Special Term, that, as regarded the plaintiff, the gifts, by the defendant to his family, were void, whatever were the moral or social claims of that family upon him for support, and that the property, whose title was taken by him in another person's name, was to be regarded as his, ought not to be disturbed as erroneous in fact, or law.

I fully coincide with my brethren, in the views taken by them, as to the impropriety of undertaking to review a discretion once exercised in a case like this. This Court is not now called upon to originate a decision as to amount; that task is always a delicate and difficult one; but, having been once discharged, there ought to be the strongest evidences of some gross mistake in law, or fact, to warrant an Appellate Court in overturning such a decision. Like cases of salvage, or unliquidated damages for a tort, when once fixed, nothing but such evidence ought to be allowed to disturb the first judgment.

Upon the whole I feel satisfied that nothing presents itself to us to warrant a reversal of the judgment at Special Term, and it should, therefore, be affirmed, with costs,

NEW YORK SUPERIOR COURT.

CATHARINE N. FORREST

agst.

EDWIN FORREST.

Opinion of Justice Woodruff, on denying motion for Commission. Special Term.—June, 1859. (Order, p. 823.)

WOODRUFF, *Justice*. The petitioner asks that the plaintiff's proceedings be stayed; that a Commission be issued to California to examine upwards of seventy witnesses, who are named, and such others as the defendant may discover to be material, and may desire to examine; that the examination may be conducted orally before the Commissioners, the defendant, or his counsel, attending before the Commissioners and examining the witnesses, with leave to the plaintiff or her counsel to attend and cross-examine.

The facts sought to be proved by the defendant are the extravagance, intemperance, and unchaste conduct of the plaintiff, while in California, between the spring of 1853 and the spring of 1856, which it is alleged became so notorious that she fell so low in the esteem of the community there that respectable persons would not associate with her.

This action was tried in January, 1852, and a judgment was entered on the 31st of that month, dissolving the marriage between the plaintiff and the defendant,

and decreeing that both be freed from the obligations thereof.

On an appeal to the General Term, that judgment or decree was, on the 24th day of July, 1856, affirmed, so far as it dissolved the marriage, and was reversed in its provisions relating to the alimony to be allowed to the plaintiff.

The reference then ordered was to take proofs and ascertain what would be a suitable allowance to the plaintiff for her support, having regard to the circumstances of the parties, respectively.

Neither of the parties moved the matter to a hearing before the Referee until the month of May now past, on the 25th of which the reference was, on behalf of the plaintiff, noticed for a hearing on the 9th of June, instant; whereupon the present application is made by the defendant.

I. The misconduct imputed to the plaintiff occurred, if at all, more than three years ago, and after the parties were divorced by the judgment of this Court.

If such misconduct could affect the plaintiff's title to alimony, or modify its amount, it was just as material when the reference was ordered as it is to-day; and it is not claimed by the defendant to have been recently discovered.

Either party might have brought on the reference and had the suit brought to a termination.

There was no sufficient reason why the defendant, if he desired to prove the facts now alleged, should wait until the reference was actually noticed, before making his motion, especially when it was perfectly well known to him that, if the Commission was sent to California, months must elapse before it could be executed and returned.

The circumstances called for instant diligence on his

part to procure the Commission so soon after the reference was ordered as the practice of the Court would allow ; and had he done so, the delay of the plaintiff in bringing on the reference would have aided him in accomplishing the execution and return of the Commission.

But such delay does not, I think, excuse the defendant's neglect to apply for a Commission. There never has been a moment since the order of reference was entered, at which the defendant knew how long a time would pass before the reference would be proceeded in ; and there has, therefore, never been a moment at which it was not his duty instantly to apply, if he desired a commission, which he knew it would take months to execute and return.

True, the plaintiff did not, in fact, move the reference until now, but she was no more bound to move it sooner than the defendant was. She might, perhaps, lose by the delay, and he, perhaps, might gain ; but that did not relieve him from the duty to be prepared for the trial whenever she thought proper to bring it on.

The suggestion, that he believed she never would proceed further in the suit, is fully answered by the plaintiff, who never gave him any reason to believe that she would relinquish her claim to alimony. On the contrary, the matters which were before the Court on the trial, show very clearly that she has always insisted upon her title to a suitable provision from the time the parties first separated ; and if the defendant, upon any mere conjecture of his own, or upon any rumor, for which she is not responsible, has deemed it safe to postpone his preparation for the reference, he has no right to complain if his unwarranted suspicion touching the plaintiff's purpose disappoints him.

And, on the other hand, the cause of the delay on the plaintiff's part is not only explained, but it is accounted for in a manner which forbids that the defendant should

make it the occasion of any complaint or the basis or ground of asking a favor. Since November, 1851, the plaintiff has been left by the defendant utterly destitute of the means of support. She has had no funds with which to pay her counsel, and has been compelled to rely upon her own personal exertions for a maintenance. It has not been in her power, therefore, to press on the reference, and now that she has at last found it in her power to bring the cause to a hearing, this new delay is sought to be interposed; and even the sum which the defendant appears to have paid her voluntarily down to November, 1851, he has since withheld. In this respect she has not been dealt with so well as it has often been held his duty as a husband, if she had herself been found the guilty party; for if she were an adulteress, Courts have said she shall not be turned off to a life of penury and shame. (*Darley vs. Darley, Wright's Ohio R.*, 514.)

I cannot regard her delay, therefore, as furnishing any sufficient reason for the neglect of the defendant to seek any testimony which his counsel deemed material long before this present application; and after more than three years have elapsed, an application which necessarily involves very great further delay and expense, ought not to be granted if no other reason forbade it.

II. If the objection already considered were not insuperable, the present motion ought not to be granted.

It seeks to procure a sort of roving Commission with which the defendant may go to California (some two thousand miles) and there examine whomsoever he may find, and upon such questions as his counsel may there propose, and although the witnesses named may know no fact material to the reference, yet, if perchance they should, on their examination, be able to inform the defendant of some other witnesses who do know some

such fact, then that the latter may be pursued and examined.

That is, the defendant would have leave to examine whom he will; and if he cannot prove his charges by those first called, he may learn from them who can or will testify to such charges, and then examine the latter: in other words, he would use the Commission first to find witnesses, and then to examine them.

If the Court have the power to issue such a Commission, it must be a very peculiar and strong appeal to its discretion, founded in urgent necessity, to prevent great injustice, that should induce it.

It is not claimed that our statute authorizing the issuing of commissions by Courts of law, confers any power on this Court to send such a Commission (2 Rev. Stat., 393-4). Under our similar previous statute (1 Rev. L., 519, § 11), in a very special case, where the plaintiff resided in a foreign country, and the transactions in question occurred in the foreign country, and were within the knowledge of the plaintiff's clerks, whose names he would not disclose, this Court went so far as to allow a Commission in which the witnesses should be designated by description, as the plaintiff's clerks generally, unless the plaintiff would disclose their names so that they might be inserted in the Commission (2 Hall's Rep., 502, *Shaffer vs. Wilcox*), but the witnesses, however described, were examined on interrogatories.

What particular circumstances induced this Court, in *The Accessory Transit Company ex. Garrison*, in December, 1857, to make the special order which was made, I am not informed. But even there the names of the witnesses were to be furnished.

Without pausing to discuss the abstract question of the inherent or original power of the Court of Chancery to procure testimony in any mode it sees fit, the

practice of the Court for two hundred years, in England and this country, is a guide which ought not to be lightly disregarded, and it may at least be said that nothing but a case of urgent necessity, and in which each of the parties will have an equal advantage, should induce us to depart from it.

The practice of the Court of Chancery in England, on the examination of foreign witnesses, appears to have been entirely uniform, and to have been by written interrogatories, and the witnesses appear to have been named, without exception, so far as I have been able to discover, either in the order for examination, or in the Commission; or where the party has been served with a list of the witnesses, with names and residence, that is all that appears to have, in some cases, been done. (See *Bowden vs. Hodge*, 2 Swanst. R., 250.) Beames' Orders, p. 30, §68, describes the practice from the year 1600 to 1815; and see note, §100: That the witnesses were said, by Chief Baron Gilbert, to be anciently examined "super int. inclusis," and *not* "super int. ministrandis." (See *For. Rom.*, 126; *Practical Register*, Ed. of 1714, p. 220.)

2 Daniel Ch. Pr., 1040, states the same practice, and refers to Beames' orders, 272, 311.

(See *Oldham vs. Carleton*, 4 Bro. C. C., 88-89.)

Cujamaul vs. Verclst, 7 Bro. Parl. Ca., case 17, p. 192, is in point in more than one of its features.

Under our statute (2 Rev. Stat., 180-1, §§ 78 to 83) provision was made for the examination of witnesses in Chancery, and power was given to direct an oral examination. But the section, permitting an oral examination [§83] applies also to examinations before a Vice Chancellor, or before an examiner. The examination of witnesses was made subject to such regulations as the Chancellor might prescribe in respect to commissions [§79], and generally the rules of Court were to govern

the subject; [see §§ 81, 87 and 88] and §88 provides expressly that he may make such rules as he shall think proper concerning the use of written interrogatories for the examination of witnesses residing out of this State.

And the rule on this subject, adopted by the Chancellor in obedience to the statute was explicit. It in terms provides, that "witnesses examined out of the State, if the parties do not consent to an oral examination, shall be examined on written, direct and cross, interrogatories, to be allowed," &c., and "annexed to the Commission." See Rule 72 of Rules of 1830, and of each revision down to the new Constitution, and also Rule 62 of the Supreme Court in Equity, under the Judiciary Act of 1847.

The rules of the Court of Chancery of 1806 and 1808, Nos. 24 to 26 (and see No. 68 of 1808, continued in force substantially down to the Revised Statutes), show that the already existing practice in England, in relation to foreign commissions, was here applied to commissions issued to examine witnesses, though residing in this State, and that written interrogatories were necessary.

In England it seems not to have been necessary for the counsel, respectively, to exhibit their interrogatories to the other, but the cross-examining counsel was left to his knowledge of the case to guide him in framing his cross interrogatories (*Butler vs. Bulkeley*, 2 Swanst. R., 373), a practice which must be deemed very unsatisfactory, and rendering further examination after the publication of the depositions, very often necessary. Rule 68 of 1808, shows that the practice of serving and settling interrogatories was early adopted in our Court of Chancery.

III. I am not satisfied that the facts sought to be

proved by means of the Commission are proper to be given in evidence on the reference.

It was adjudged on the 31st day of January, 1852 that the marriage between the plaintiff and defendant be and the same was dissolved.

For all the purposes of the present motion and of the reference ordered the defendant must be deemed the guilty party. It is his wrong that has deprived the plaintiff of the protection of a husband and the support and comfort which, if she was innocent, he was bound to furnish to her, in a home corresponding with the station in life she had occupied before the occurrences which led to the results now before our minds.

He was bound to support her in that station, if no divorce was procured. His adultery, and the divorce which followed, did not relieve him from the duty while it discharged her from her obligation to him.

In a sense, which under the civil law would be recognized with more force even than under our own, the accumulated property was in part her own.

Under these views of her rights in the property of her late husband, and her title to support, it seems to me that the only circumstances, which are the subject of inquiry upon the reference heretofore ordered, are exclusively of a pecuniary nature—such as directly affect the amount of pecuniary provision which would have been proper, had the reference proceeded on the day it was ordered; and that that amount is precisely that sum which would have been proper had the amount been fixed on the day the judgment of divorce was pronounced, only affected by proof of such change in the pecuniary condition of either of the parties as may properly augment or diminish the amount.

Whatever duty the plaintiff, after her divorce, owed to the community in which she lived to lead a pure and virtuous life, she owed no duty to the defendant other

or greater than she owed to any other member of that community.

By her marriage and subsequent divorce she acquired a right to her suitable allowance, and if it had been fixed in amount and actually awarded January, 1852 (as it would have been had no error been committed in the conduct of the proceeding), her subsequent misconduct, if she was guilty, would not, I think, have forfeited it—and for the obvious reason that she would not have violated any right of her late husband, however much she outraged the moral sense of the community. Her late husband would not, I think, have any standing in Court on an application to reduce her alimony upon any such ground. The answer to his application would be, if he proved the misconduct he charged;—it now only appears that both are guilty of misconduct, and so long as it remains true that she has not herself wrongfully contributed to the guilt of the defendant, and especially if it be open to the conjecture that her destitute or unprotected situation has contributed to her fall, so long such mutual wrong ought not to affect the division of the money of the husband and the appropriation of a suitable share to her maintenance.

If in a just sense the innocent wife may be said to have a right, at the moment the decree of divorce is pronounced, to have alimony according to the then pecuniary condition of the husband, his wealth and personal income, with reference also to the number of those dependent upon him for support, and the society in which before the divorce the parties have been accustomed to move, and that right be so far fixed that security therefor may be required; then the cases, which hold that, where a wife who is entitled to jointure or the benefit of a settlement, but finds it necessary to invoke the aid of a Court of Equity to obtain the benefit of the trust or the execution of the agreement, she will not be defeated in

that Court by proof of her adultery, or that she is then living in adultery, have an analogous and forcible bearing upon the present question. If the Court of Chancery could exercise its discretion in view of such moral considerations as the condition of such a complainant would suggest, it would seem not unreasonable to refuse to enforce a settlement in favor of a woman, who, though still in law a wife, was living in flagrant and profligate disregard of the obligations which formed the inducement to the settlement. The Court might at least say, we will not exercise our power in your behalf; you may seek and enforce any strictly legal rights in the Courts of Law, but a Court of Equity will not interfere in behalf of an adultress.

Not so. The Court of Chancery will interfere at the instance of the wife and enforce the specific execution of marriage articles, although the wife is living separate from the husband in a state of adultery; and so also, to compel performance of articles binding the husband to her maintenance on an agreement to separate, although she be then living in adultery. See on this subject *Sidney vs. Sidney* (3 Peer Williams, 269), *Blount vs. Winter* (Id., 276, w.), *Seagrave vs. Seagrave* (13 Ves. R., 439). See a similar ruling at Law, *Baynon vs. Batley* (8 Bing. R., 256), *Lee vs. Thurlow* (2 Barn. & Crass. R., 547), which, however, adds no strength to the proposition, since a Court of Law has no discretion whether or not to award a recovery on a right established by a legal covenant.

In a case earlier than *Sidney vs. Sidney*, viz.: *Mildmay vs. Mildmay* (1 Vernon Rep., 53), after a divorce, *a mensa et thoro*, the wife applied to the Court of Chancery to obtain the rents which had been settled upon her, and on its appearing that she was a lewd woman who had eloped from her husband, and the husband yet offering to take her again, the Court gave her only partial

relief, but did not refuse altogether to interfere on that ground, and the leading case of *Sidney vs. Sidney*, afterwards determined that her adultery furnished no reason for withholding the relief which the adulterous wife sought.

It is undoubtedly true that upon proof that a woman lately complaining that she had been wronged by the infidelity of her husband, and asking with the urgency of indignant virtue to be redressed, is now herself leading a life of profligacy and shame, the outraged moral sense of every upright and honorable mind would, in its first impulse, incline to declare her entitled to no aid from the Court in compelling a support which she shows herself ready to abuse. But this would plainly be extreme for more than one reason. Possibly her unprotected and destitute condition may be itself the cause of her decline from virtue; and if not so, still she is not to be left to degradation as her only resource. Even if she had been an adulteress, and her husband were on that ground divorced, she should not be left to a life of shame for want of a comfortable support. Whether under our statute, in the case last stated, she could claim alimony, I need not say, but in England the husband seeking and obtaining a divorce from his guilty wife has been required to provide for her comfortable maintenance. (See *McQueen's Pr. House of Lords*, 537, 9; *Observations of Best, J., in Lee vs. Thurlow*, 4 Dow. and R., 17. So also ruled in *Darley vs. Darley*, in *Wright's Ohio R.*, 514; and see *Robinson vs. Gosnold*, 6 Mod., 171.)

This indeed does not show that lewdness after divorce may not be taken into account, but it suggests that no rule can readily be stated, by which the influence it could be allowed to have should be measured.

I have not been able to find any cases in which

on an inquiry into the amount to be allowed for alimony, the conduct of the wife after the marriage is annulled has been taken into view. The circumstances which are the subject of inquiry, have been of a direct pecuniary nature. The applications for an increase or diminution of alimony, which are permitted after alimony has once been settled, are of that description. (See *Foulkes vs. Foulkes*, cited Poynter on Marriage and Divorce, 256, n. (q.); *Kirkwell vs. Kirkwell*, *Id.*, n. (p.); *De Blacquiere vs. De Blacquiere*, 3 Haggard R., 322; *Wilson vs. Wilson*, *Id.*, 329, note; *Paff vs. Paff*, 1 Hopkins' R., 584; *Holmes vs. Holmes*, 4 Barb. S. C. R., 295; *Miller vs. Miller*, 6 Johns. Ch. R., 91.)

It is stated in the Digests (2 U. S. Dig., 514) that in *Sloan vs. Cox*, 4 Heyw., 75 (2 Heyw. Tenn. R.), it was held that in Tennessee a husband who has been divorced from bed and board, and decreed to pay alimony to his wife, cannot avoid the payment thereof on account of the subsequent lewdness and adultery of the wife. I have not been able to find Heyward's Tennessee Reports in any library to which I have access; whether therefore this case proceeds upon any peculiarity in the law of Tennessee, I am not able to say, nor can the case, upon the mere reference to it in the digest, be taken as of value as authority. On examination of the case itself, it might appear to have no influence on the present question. But it is obvious that if in such a case the lewdness and adultery of the wife would not deprive her of alimony, it ought still less to affect it when the divorce was absolute.

The case of *Peckford vs. Peckford* (1 Paige R., 274) undoubtedly recognizes the idea that where the conduct of the wife before the divorce was such as in some degree contributed to the husband's fall from virtue, that conduct may be taken into view; and the Chancellor there also mentions her subsequent indiscretions before

the decree as considered by him in fixing the amount. But no case is mentioned to me going any further, and I am not satisfied that the remarks there made by the Chancellor find any warrant. In *Burr vs. Burr* also (10 Paige R., 20), the indignities and cruelties suffered by the wife before the divorce were deemed entitled to consideration in fixing the alimony.

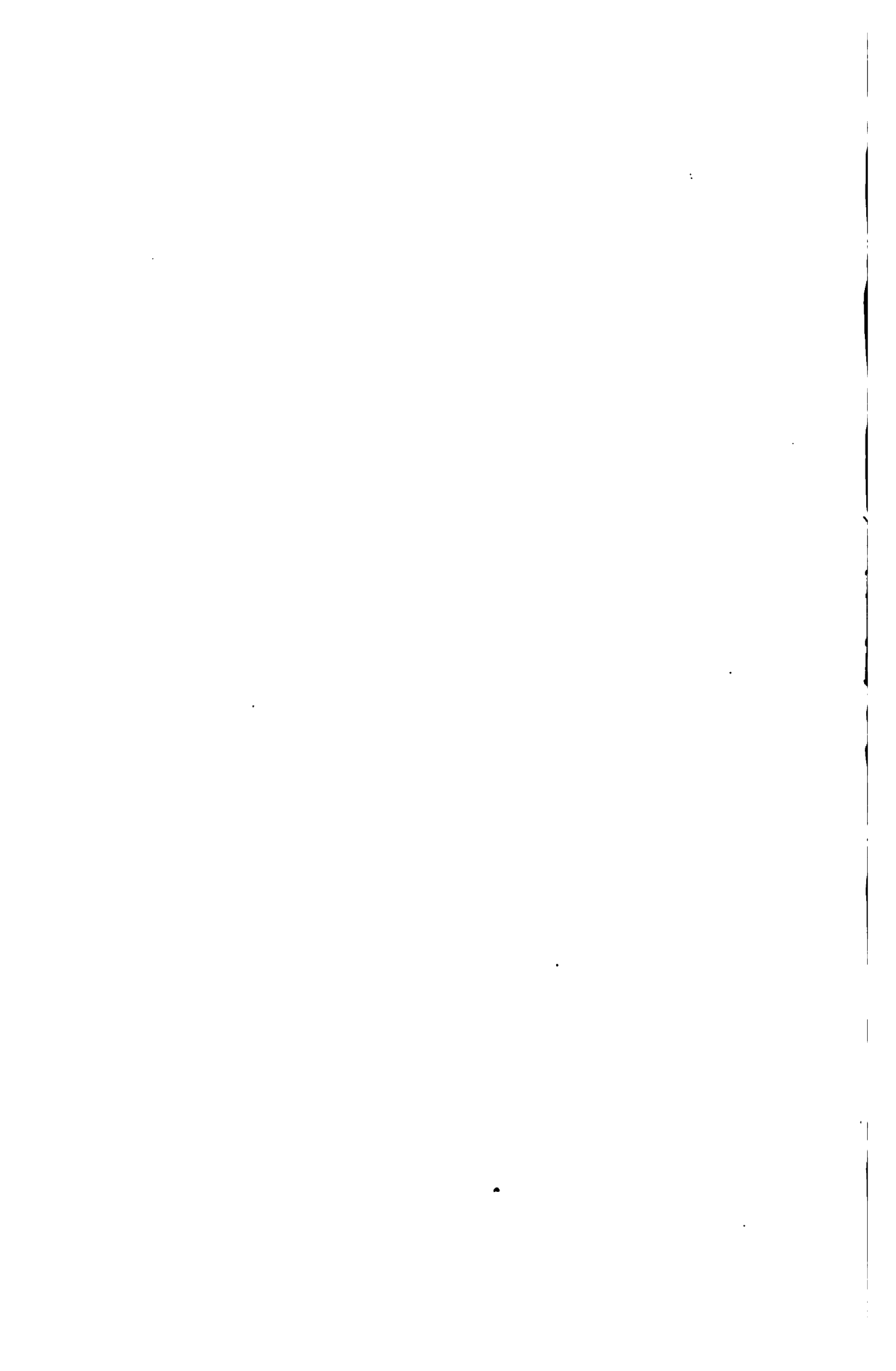
In both of these cases the conduct in question was prior to the divorce; in the latter case the relation of husband and wife still continued. Both cases seem to regard the allowance of alimony as in a manner punitive, and to be enlarged or diminished as the husband's offense was more or less aggravated; and in some degree liable to be affected by the manner in which the wife had performed the duties of the conjugal relation while that continued. But neither of the cases warrant, I think, any such inquiry after that relation had ceased, and the duties resulting therefrom no longer subsist.

To prevent any misapprehension from what has been said in respect to the conduct of the plaintiff subsequent to the divorce, it is proper to state that the affidavits used by the defendant on this motion speak of the reputation which the plaintiff had acquired in California.

No one states any instance of unchaste conduct to the personal knowledge of the party making such affidavit.

The plaintiff, on the other hand, denies in the most full and unqualified terms, that she has been guilty of any unchaste conduct, or that her reputation in California is such as the defendant alleges, but, on the other hand, she charges that whatever unfavorable repute she may have is due mainly to the persistent efforts of the defendant to destroy her character.

My conclusion is that the motion must be denied.



N. Y. Court of Appeals.

| | |
|----------------------------------|---|
| EDWIN FORREST, APPELLANT | } |
| (Defendant), | |
| <i>agst.</i> | |
| CATHARINE N. FORREST, RESPONDENT | |
| Plaintiff. | } |

THE APPEALS.

This is an appeal from a final judgment entered at General Term of the SUPERIOR COURT OF THE CITY OF NEW YORK, on the 26th day of December, 1861, by which a divorce is awarded to the plaintiff for the adultery of the defendant, with an allowance to the plaintiff of *thirty-five thousand five hundred and ninety-three dollars*, for *arrears of alimony*, after crediting certain amounts paid to her by order of this Court, on and after the 1st of August, 1859. The judgment also awards to her permanent alimony, at the rate of FOUR THOUSAND DOLLARS *per year*, in equal quarterly installments, the sum of \$35,593, first mentioned to be paid into the hands of the United States Trust Company, of New York, within thirty days from the entry of the order for final judgment, and notice thereof to the defendant's attorneys, and the sum of one thousand dollars, quarterly, during the continuance in life of both the parties to the suit, the defendant being required, as security for such payments, to assign to the aforesaid Trust Company a mortgage on certain property at Fonthill, on the Hudson River, executed to the appellant by the Sisters of Charity

of St. Vincent de Paul, dated 20th December, 1856, for \$75,000 one-half of which amount, secured by said mortgage, is not payable until six months after the dower right of the respondent is extinguished.

The mortgage contains other clauses (*folios* 3365, 3372) relating to such dower right, and its effect upon the mortgaged premises.

The judgment order contains other provisions of a special character. *Case, folios* 3445 to 3459.

This appeal embraces, *also*, an appeal from the *interlocutory judgment* of the Superior Court, for divorce, entered at General Term, July 24, 1856 (*folios* 1821 to 1833).

Also, from an order of the Superior Court, at General Term, entered on the 30th of August, 1859, *denying a motion for a commission*, made by the defendant, during the reference, to fix the allowance of permanent alimony.

The appeal from the interlocutory judgment of divorce includes *twenty-four exceptions* taken by the defendant, on the trial of the issues hereafter mentioned; and *twenty-nine exceptions* to the conclusions of fact and law, of the Referee, by whom the report as to permanent alimony was made, namely, ALVIN C. BRADLEY, Esq.

HISTORY OF THE SUIT.

The marriage of the parties in this suit took place January 23, 1837.

The suit for divorce was commenced on the 22d November, 1850.

The complaint (*folios 3 to 39*) made various charges of adultery against the defendant. By his answer (*folios 39 to 58*) he made similar charges against the plaintiff.

The order for issues (*62 to 67*) was made on the 24th of December, 1850. The trial of such issues commenced before the late CHIEF JUSTICE OAKLEY and a jury, on the 15th of December, 1851, and was concluded on the 26th of January, 1852, by a verdict for the plaintiff on all the issues, the jury settling the amount of permanent alimony to be allowed her at *three thousand dollars per year*.

On that verdict, an interlocutory judgment (*folios 68 to 80*) was entered on the 31st of January, 1852. A bill of exceptions being sealed (*folios 81 to 1809*) and argued at General Term, the judgment was *reversed as to the allowance of permanent alimony, and a reference ordered to Mr. Bradley to report as to the amount thereof, &c.*

The first meeting before the Referee was held on the 9th of June, 1859, on the first day of which month the defendant obtained an order for the plaintiff to show cause why a commission should not be issued to California, to examine certain witnesses, named at *folios 1856 to 1858*, for the purpose of proving, that, *since the interlocutory judgment for divorce, in 1852, the plaintiff had led a life of EXTRAVAGANCE, INTEMPERANCE, IMMORALITY, and VICE.*

This order was forwarded on the petition of the defendant, and the affidavits of WILLIAM T. COLEMAN, M.

HALL McALLISTER, THEODORE PAYNE, WILLIAM H. TALLMADGE, THEODORE A. WAKEMAN, also an affidavit of the defendant.

See folios 1838 to 1895.

The names of the witnesses whom Mr. Forrest thus sought to examine are stated at *folio 1856*.

Mr. *McAllister*, one of the gentlemen aboved named, made his deposition under the compulsion of a summons (fol. 1855), and says "he is not a voluntary witness (fol. 1877). He was, when he deposed, *Judge of the Circuit Court of the U. S. for the District of California*. He had no personal knowledge of Mrs. Forrest's character;" but he says: "*At the time of her residence in San Francisco, the reputation imputed to her generally, and among others by myself, was that of a LEWD and PROFLIGATE WOMAN.*"

Mr. *Theodore Payne*, who had resided in San Francisco since 1849, says: "Her general character and social position in San Francisco were such as to preclude the possibility of her associating with the chaste and virtuous;" and he adds, "*from the frequent references made to her character, deponent has no hesitation in believing her to be corrupt*" (fol. 1898).

Mr. *William H. Tallmadge* says her social position and character in San Francisco were "*notoriously low and bad,*" and that "*she is generally understood and believed at San Francisco to be utterly devoid of chastity*" (fol. 1890).

In her affidavit, in answer to this petition, Mrs. Forrest denies having committed adultery or fornication, or led a life of vice in San Francisco, but *does not aver that her general reputation and social position there were not as*

stated by the witnesses just above referred to (fols. 1887 to 1913) ; nor did she produce even one affidavit to the contrary of what they stated, although she took the trouble to obtain the deposition of one John Hall Wilton (fol. 1949), who, after swearing that he never was in California whilst the plaintiff was there, says that, from all he has "seen, or known, or believed" concerning her, he "believes her to be a good, worthy, virtuous woman."

The papers which were used to oppose the motion related chiefly to the wealth of the defendant, his pertinacity in defending this suit, and the assaults he made upon the character of Mrs. Forrest.

Before the motion for the Commission was made, Mr. John Van Buren, who had theretofore been counsel for the defendant from the commencement of the action, left this country on a visit to Europe, and James T. Brady was engaged as one of the counsel for defendant.

Mr. Justice Woodruff, at Special Term, in deciding that the Court had power to direct taking the deposition of Mr. Hall McAllister, above referred to, *de bene esse* held that he "regarded it as quite clear" that the depositions, &c., taken under the Commission, could not be used (fol. 3640). He admitted the power of the Court to direct the taking of the depositions, and held that the inquiry before the Referee, as to alimony, was "*a trial* within the fair meaning of the statute."

The same Judge, at Special Term, denied the motion for a Commission, even without a stay of proceedings, substantially on three grounds, viz.: that the defendant had been guilty of *laches*; that a Commission should not be granted in the form sought, even if the Court had power to award it, and that the facts sought to be proved by means of the Commission were not proper to be given in evidence before the Referee. (See his opinion at folio 3914.)

The order, denying the Commission, was affirmed at General Term by Judges Bosworth, Woodruff, and Moncrief, *Justice Pierrepont dissenting*, the opinion of the Court being delivered by Ch. J. Bosworth, who holds:

FIRST. That the reference was not a proceeding in an action *at law*, and the application for a Commission should be disposed of, "precisely as the late Court of Chancery would dispose of a like motion, made under the same *peculiar* facts and circumstances" (folio 3770).

SECOND. That it is *difficult* to "*state any rule by which it can be ACCURATELY determined, in a manner that will operate justly UPON ALL PARTIES to such actions (of divorce), what is and what is not extravagance, and what is a vicious and debased association IN SUCH SENSE, that, by reason of a complainant's being guilty of it, a diminished amount of alimony should be allowed to her.*" (folio 3774).

THIRD. That "*the RANK and POSITION, which the parties occupy in society, and their GENERAL MODE OF LIFE, should be considered, and the allowances made, AS A GENERAL rule, should, AT ALL EVENTS, be sufficient to enable the wife to continue in the enjoyments to which she has been accustomed, when the husband's income is adequate to support both, as they have been accustomed to live*" (folio 3777).

FOURTH. "*That it is HIS DUTY to provide the means for her support and maintenance, to the amount DETERMINED to be suitable and just; her manner of EXPENDING it he has no right to dictate*" (folio 3778).

FIFTH. That, what the husband "*should be made to pay as the means of her future support, according to all GENERAL RULES OF JUDGMENT, must depend upon the facts which CREATE THE RIGHT; and they must be facts EXISTING, and AS THEY EXIST, when the right becomes FIXED and PERFECT. The time of PRONOUNCING THE DECREE IS THE ONE at which the RIGHT is judicially ascertained and declared*" (folio 3788). He remarks, at folio 3793: "*The argument is quite strong, that the RIGHTS of THE PARTIES are to be settled and fixed upon the facts as they exist at the time the decree of divorce is pronounced.*"

SIXTH. That, "considering the length of time that this branch of the law furnishes evidence through the reports, and otherwise, of the mode in which it had been administered, in this and other States of the Union, the fact that such subsequent misconduct does not appear to have been presented, as an element to affect the amount of the allowance, may be regarded as a strong and almost conclusive presumption against its admissibility" (folio 3798).

SEVENTH. That our statute, in regard to divorces, is "*imperative, and that it is the right of the wife to demand, and the duty of the Court to decree a suitable allowance*" (folio 3799). And he says, at folio 3804: "*When a woman is divorced from her husband, by reason of his adultery, her RIGHT to such suitable allowance as may be just, having regard to the circumstances of the parties, respectively, AS THEY EXIST, AT THE TIME*

THE DECREE IS PRONOUNCED, IS PERFECT
and ABSOLUTE."

EIGHTH. That it is no part of the province of the Court that fixes the amount, to watch over her subsequent conduct in life, or to take proof of it as a ground of affecting the *right* to an allowance, *or its amount*. Her "*subsequent misconduct* no more impairs her *right* to it, than such subsequent misconduct would impair *her right to dower*, or to a distributive share of her husband's personal estate, if he had died intestate and no decree had been pronounced."

NINTH. "That the order appealed from was properly granted, *on the ground that the facts sought to be proved are inadmissible in evidence on the pending reference*" (folio 3808).

Although these conclusions, approved by a majority of the Court, determined the appeal, his Honor proceeds to argue in support of other reasons assigned by Judge Woodruff for denying the commission. The views he presents in that connection will be considered under one of the Points which follow this statement.

Judge Pierrepont gave an opinion to the effect that, in fixing the amount of alimony, the immoralities and bad conduct of the wife, after the decree of divorce is pronounced, and before the amount of permanent alimony is finally fixed, should be considered by the Court. (See his opinion at page .)

On the 22d of July, 1859, the Court, on motion of the plaintiff, made an order (folio 2746), *requiring the defendant to pay to her use, to enable her to carry on the suit, the sum of \$1,500 on the 10th of August, 1859, and the further*

sum of \$200 on the first Monday of each month thereafter, during the pendency of the suit, and until final judgment fixing the amount of permanent alimony, and on the 31st of December, 1859, the Court made another order, increasing such monthly allowance to \$250, commencing on the first Monday of February thereafter (see folio 3441).

The first application for an allowance or for alimony ever made by the plaintiff was in 1859.

The Referee's report as to alimony (*folio 2751*) was filed December 1, 1859.

1. He finds, amongst other things :

A. That the defendant has no interest in her acquisitions after the judgment of divorce, whether by marriage, by the needle, the pen, the concert, the theatre, by devise or inheritance (*folio 2825*).

B. That the defendant is a *debtor* and the plaintiff a creditor, for the amount of the allowance, and the plea that the creditor has money enough already might as well be interposed as a defense against any other debt as this (*folio 2827*).

2. He rejects all the evidence as to what it would cast her to support herself in a comfortable, decent and proper manner, although proof was given to show what would be the expense of such support in apartments, boarding, or in keeping and occupying a house.

See testimony of WARREN LELAND, fol. 908.

FREDERICK BARTLETT CONWAY, " 627.

EDWARD PHALON..... " 928.

WILLIAM H. WELLER..... " 937.

CHARLES W. BAKER..... " 891.

HENRY WHEELER..... " 946.

3. He holds also that :

A. The *wealth* of the defendant is *not only* to be looked

to in order to determine *his ability to pay* the allowance, but also to determine *what amount is suitable to allow* (*folio* 2810).

B. The defendant gave plaintiff to understand in the most solemn form, when he married her, that what he acquired she should share (*folio* 2818).

C. He holds, as a matter of law, that in *all* defendant's *prosperity after the divorce*, it is *just* the plaintiff should share (*folio* 2820).

D. He rules that although the plaintiff, by a second marriage, should become entitled to a double maintenance, she would have a right to both (*folio* 2824.)

E. That although no part of the allowance received from defendant should be allowed to plaintiff's maintenance, the defendant can not justly complain (*fol.* 2825.)

F. That the allowance once fixed becomes a sum in gross, payable at stated periods, to be expended by the recipient at pleasure (*Ib.*, *fol.* 2826).

And he makes the allowance not in reference to the style in which she lived with him, nor the amount allowed by him on a voluntary separation—viz.: \$1,500 per year—nor to the expenses of her support as proved before him, but according to the expectations which he says “were justly inspired by the erection of Fonthill as a residence, and the more elevated social rank she was to acquire” (all of which, the Court will observe, she had abandoned by the voluntary separation), and also according to the purchase of a house in Philadelphia several years after the judgment for divorce, intended for the residence of his sisters and himself (*fol.* 2816 *of Case*).

4. He estimates the *entire income* of the defendant's

estate in 1852 (the year in which the interlocutory judgment for divorce was entered), at \$5,350 (See *case*, folio 2764), and the actual value of his property at the same date at \$71,000, omitting the Fonthill and Covington property.

He gives no estimate whatever of value intermediate to the date last mentioned, and the times when property of the defendant was sold which he owned at Fonthill, Chelsea, New Rochelle, and Tenth street, Philadelphia. The second estimate of the defendant's estate is what the Referee considers to be its value and income at the date of the report. One valuation is therefore in 1852, and the other in 1859.

5. The Referee's estimate of defendant's estate *at the date of the report* is as follows :

Real estate owned by E. Forrest, and
standing in his name :

| | |
|-----------------------------|----------|
| Cincinnati (fol. 2764)..... | \$15,000 |
| Covington (fol. 2764),..... | 20,000 |
| Yonkers (fol. 2764)..... | 36,000 |

| | |
|---|----------|
| Total real estate owned by E. Forrest,
and standing in his name..... | \$71,000 |
|---|----------|

Real estate now owned by E. Forrest,
and standing in the name of his sisters :

| | |
|-----------------------------------|--------|
| Small lot in Yonkers (fol. 2768), | \$400 |
| 37 and 39 Thompson st., N. Y., | 8,500 |
| 9 acres in Yonkers..... | 6,000 |
| Lot in the fields, Phila..... | 400 |
| Dwelling in Phila..... | 33,050 |
| Lot adjoining dwelling in Phila.. | 5,000 |

| | |
|----------------------|----|
| Carried forward..... | \$ |
|----------------------|----|

| | |
|---|-----------|
| Brought forward..... | \$71,000 |
| Total real estate owned by E. Forrest,
and standing in the name of his sis-
ters..... | 53,380 |
| Personal estate of E. Forrest, admitted
by himself (as Referee alleges), see
fol. 2767..... | 136,250 |
| Interest in ship "E. Forrest"..... | 3,500 |
| Library given by E. Forrest to his sis-
ters..... | 4,592 |
| Amount of E. Forrest's property, real and
personal (see <i>case</i> , fol. 2771)..... | \$268,722 |
| The Referee's estimate of defendant's income is as fol-
lows: | |

| | |
|--|-----------|
| Amount of Referee's estimate of defend-
ant's property..... | \$268,722 |
|--|-----------|

The property shown to yield no income
whatever is as follows:

| | |
|--|-----------|
| Covington..... | \$29,000 |
| Yonkers..... | 36,000 |
| 9 acres at Yonkers..... | 6,000 |
| Small lot in Yonkers..... | 400 |
| House in Philada..... | 33,080 |
| Lot in Philada..... | 5,000 |
| Lot in the fields in Philada.... | 400 |
| Wardrobe, Books, Pictures, of
E. Forrest..... | 5,000 |
| Library..... | 4,592 |
| Money in Bank..... | 2,550 |
| Maurice's Bonds..... | 15,000 |
| | <hr/> |
| | 128,022 |
| | <hr/> |
| | \$140,700 |

Items in regard to which no income was proved :

| | |
|--------------------------------|-----------|
| Stock in Yonkers Bank..... | \$1,000 |
| Butler House..... | 1,000 |
| Arch street Theatre..... | 300 |
| 37 and 39 Thompson street... | 8,500 |
| Interest in ship "E. Forrest," | 3,500 |
| | <hr/> |
| | 14,300 |
| | <hr/> |
| | \$126,400 |

His income, as proved from his property, is :

| | |
|---|---------|
| Fonthill Mortgage of \$75,000, | |
| is, at 6 per cent..... | \$4,500 |
| Cincinnati property..... | 1,200 |
| Mortgages on Chelsea and New Rochelle property, \$36,400, | |
| at 7 per cent..... | 2,548 |
| | <hr/> |

| | |
|--|-----------|
| His entire gross income at the date of the report is, therefore, | \$8,248 |
| His entire productive property, | \$126,400 |

6. The right of the defendant's sisters to be supported by him is thus recognized by the Referee : " His mother, and his three sisters, as well as himself, were all poor. They relied upon his filial and fraternal affections for support, and seem not to have relied in vain. That this was so, the plaintiff must have known at the marriage, and must be deemed to have concurred in its propriety. The mother lived long enough to witness the distinction of her son, and to partake largely of his prosperity. She died in 1847. The sisters still survive. At the divorce they continued dependent on him for support, and are so still, except so far as that dependence may have been removed by his bounty" (*folio 2821 of Report*).

The principles on which the Referee settles the allowance are these :

1. He begins by *stripping the sisters of this bounty, and including the whole of it in defendant's estate*. He leaves the plaintiff a *right of dower* in the entire real estate of defendant. He finds that *one-third of the purchase money on all the real estate sold is retained by the mortgagors or purchasers, to meet the claim for dower*, and finds the property at Yonkers and at Covington "comparatively valueless for agricultural, or any other purpose, except for building sites and fancy residences, but the plaintiff's inchoate right of dower therein forms an effectual bar to a sale for such purposes at a reasonable price" (*folio 2766 of Report*).
2. Out of a productive estate, then, of \$126,400, he directs the payment to plaintiff of \$4,000 a year for the nine years prior to his report, making \$36,000. From that he deducts nothing for any sums the plaintiff has received from the defendant's estate for support, counsel fees, or otherwise. He sets apart the \$75,000 mortgage, at six per cent., as the security for the payment of future alimony, at the rate of \$4,000 per year. This exhausts \$67,000 of the mortgage. He thus takes \$103,000 from an active estate of \$126,400, and leaves \$13,400, from the income of which the defendant is to support himself and his three sisters, and pay assessments and taxes on his real and personal property, including perhaps the mortgage on which the alimony is secured, and also fees for the repair of his real property, and other expenses of agency, insurance, &c., connected therewith.

3. The plaintiff to whom this allowance is made, of nearly the whole of his income, is a single woman, *never having contributed one cent to the defendant's estate (Case, fol. 2751)*, whose social position is such as an actress of no great eminence attains, having no child, nor any being properly connected with her who has any claim upon the defendant or his estate, and this sum of four thousand dollars per year is pretended to be given for her support, and as reasonable for that purpose, although many gentlemen in public and private stations receive a salary of far less amount, out of which, even in this expensive city, they can and do maintain themselves and large families in a comfortable and honorable manner.

We have thus fully alluded to the report of the Referee, his conclusions and theories, because the Court, in confirming such report, seem to have fully concurred with him, as will hereafter be seen.

Exceptions to the report and findings were filed on the 10th December, 1859. The report was, however, confirmed at *Special Term*, June 2, 1860; at *General Term*, March 20, 1862, when the final judgment in the suit was entered.

It will thus be seen that, during this protracted litigation, the defendant was so unfortunate or so wrong that no exception taken by him to either of the proceedings has ever been sustained, no motion granted which he made, and that the only change in any order made against him was by increasing, from time to time, the allowance he was directed to pay to the plaintiff.

OUTLINE OF FACTS.

It has already been stated, that the marriage of the parties to this suit took place June 23, 1837. Mr. Forrest was then, as he is now, a distinguished American tragedian. Mrs. Forrest, whose acquaintance he made during a professional engagement in England, was about nineteen years of age, and the daughter of a Mr. Sinclair, who was, originally, a musician in the Argyleshire militia; afterwards, a public singer.

The marriage took place in London. Up to the time that he visited England, Mr. Forrest had resided in Philadelphia. His family, consisting of his mother and two sisters, whom he had always maintained from the time of his earliest efforts, yielded him the means of doing so; his mother died in the year 1847.

In May, 1838, he removed to New York, and resided there with his wife, in his own house, until April 28, 1849.

They then separated by consent, and lived apart; he making an allowance for her support, *at the rate of fifteen hundred per year*, which was regularly paid, up to November, 1851 (fol. 1898).

After their separation, they had no intercourse as husband and wife, and in the fall of 1849 ceased to have any association with each other, and have continued to live apart ever since.

In February, 1850, a negotiation occurred between the parties, in which their counsel and Messrs. *Wm. C. Bryant* and *James Lawson* took part. It resulted in a written stipulation that Mr. Forrest might obtain a divorce from Mrs. Forrest, through the Legislature of Pennsylvania (fols. 1702 to 1716). This agreement was never carried into effect.

At some time in 1849 (in June of that year, accord-

ing to the testimony of his sister *Henretta*, fol. 272), Mr. Forrest *resumed his residence in Philadelphia*, with his sisters, and has resided there ever since; but there is a dispute in the evidence as to when he did, in fact, thus return to reside in Philadelphia.

During all the time that the parties were residing together, and up to the year 1849, Mr. Forrest was frequently engaged in his profession, at different places in the United States, and was often absent from his home, for considerable periods.

While he was thus away, Mrs. Forrest had charge of his household in the city of New York, *and at certain times her father and mother, and her sisters Margaret and Virginia, dwelt in the family as guests, and without any charge.*

Mrs. Forrest was a lady of social habits, and fond of company; accustomed to the use of wine, stimulating drinks, and cigars. During her husband's absence from the city, she entertained in his house a number of gentlemen, with some of whom Mr. Forrest had no acquaintance, and for others of whom he had neither respect nor friendship.

Amongst the persons whom she thus entertained were NATHANIEL PARKER WILLIS, RICHARD STORRS WILLIS, SAMUEL MARSDEN RAYMOND, CAPTAIN WILLIAM H. HOWARD, *of the United States Revenue Service*; CAPTAIN GRANBY CALCRAFT, *of the Royal Navy, his friend, a nephew of Lord Fortescue*; CAPTAIN JOHN BRITAIN, HENRY WYKOFF, Esquire, and GEORGE W. JAMISON, *he actor.*

Some of these gentlemen supped in the house, and remained there until late hours; while Mr. Forrest was absent from the city, and during such absence, some of them passed the night there; the nature of the entertainment which she provided for these visitors, and their

deportment, while her guests, will appear from the testimony of some of her witnesses, and her own admitted statements.

On the 24th December, 1849, Mr. Forrest addressed to his wife a letter, which will be found at folio 1995.

No. 3.

A.

[LETTER FROM EDWIN FORREST TO MRS. FORREST.]

I am compelled to address you by reports and rumors that reach me from every side, and which a due respect for my own character compels me not to disregard. You cannot forget that before we parted you obtained from me a solemn pledge that I would say nothing of the guilty cause, the guilt alone on your part—not on mine—which led to our separation ; you cannot forget that at the same time you also pledged yourself to a like silence, a silence that I supposed you would be glad to have preserved. But I understand, from various sources, and in ways that cannot deceive me, that you have repeatedly disregarded that promise and are constantly assigning false reasons for our separation, and making statements in regard to it, intended and calculated to exonerate yourself and to throw the whole blame on me, and necessarily to alienate from me the respect and attachment of the friends I have left to me. Is this a fitting return for the kindness I have ever shown you ? Is this your gratitude to one who, though aware of your guilt, and most deeply wronged, has endeavored to shield you from the scorn and contempt of the world ? The evidence of your guilt you know is in my possession. I took that evidence from among your papers, and I have your own acknowledgment by whom it was written, and that the infamous letter was

addressed to you. You know as well as I do that the cause of my leaving you was the conviction of your infidelity. I have said enough to make the object of this letter apparent. I am content that the past shall remain in silence, but I do not intend, nor will I permit that either you or any one connected with you shall ascribe our separation to my misconduct. I desire you, therefore, to let me know at once whether you have, by your own assertions, or by sanctioning those of others, endeavored to throw the blame of our miserable position on me. My future conduct will depend on your reply.

Once yours,

(Signed)

EDWIN FORREST.

New York, Dec. 24, 1849.

On the same day she addressed to him one (fol. 1999) :

A.

I hasten to answer the letter Mr. Stevens has just left with me, with the utmost alacrity, as it affords me at least the melancholy satisfaction of correcting misstatements, and of assuring you that the various rumors and reports which have reached you are false.

You say, that you have been told that I am "constantly assigning false reasons for our separation, and making statements in regard to it intended and calculated to exonerate myself, and to throw the whole blame on you:" this I beg most distinctly to state is *utterly untrue*.

I have, when asked the cause of our sad differences, invariably replied, that was a matter known only to ourselves; and which would *never* be explained; and I neither acknowledge the right of the world, nor of our most intimate friends, to question our conduct in this affair.

You say, "I desire you, therefore, to let me know at once whether you have, by your own assertions, or by sanctioning those of others, endeavored to throw the blame of our miserable position on me." I most solemnly assert that I have never done so, directly or indirectly, nor has any one connected with me ever made such assertions with my knowledge, nor have I ever permitted any one to speak of you in my presence with censure or disrespect. I am glad you have enabled me to reply directly to yourself concerning this, as it must be evident to you that we are both in a position to be misrepresented to each other; but I cannot help adding, that the tone of your letter wounds me deeply; a few months ago you would not have written thus. But in this neither do I blame *you*; but those who have for their own motives poisoned your mind against me—this is surely an unnecessary addition to my sufferings; but while I suffer I feel the strong conviction that some day, perhaps one so distant that it may no longer be possible for us to meet on this earth, your own naturally noble and just mind will do me justice, and that you will believe in the affection which for twelve years has never swerved from you. I cannot, nor would I endeavor to subscribe myself other than

Yours, now and ever,

(Signed)

CATHARINE FORREST.

Dec. 24th, 1849.

* And on the 29th another (fol. 2003):

B.

Saturday, Dec. 29th.

In replying to the letter I received from you on Monday last, I confined myself simply to an answer to the questions you therein asked me; for inasmuch as you said you were content that the past should remain in

silence, and as I was myself unwilling to revive any subject of dispute between us, I passed over the harsh and new accusations contained in your letter ; but on reading and weighing it carefully, as I have done since, I fear that my silence would be construed into an implied assent to those accusations. After your repeated assurances to me prior to our separation, and to others since then, of your conviction that there had been nothing criminal on my part, I am pained that you should have been persuaded to use such language to me. You know as well as I do that there has been nothing in my conduct to justify those gross and unexpected charges ; and I cannot think why you should now seem to consider a foolish and anonymous letter as an evidence of guilt, never before having thought so, unless you have ulterior views, and seek to found some grounds on this for divorce ; if this be your object, it could be more easily, not to say more generously obtained. I repeatedly told you that if a divorce would make you more happy, I was willing to go out of this State with you to obtain it, and that at any future time my promise to this effect would hold good ; you said such was not your wish, and that we needed no court of law to decide our future position for us. From the time you proposed our separation I used no remonstrance save to implore you to weigh the matter seriously, and be sure, before you decided, that such a step would make you happy ; you said it would, and to conduce as much as lay in my power to that happiness, was my only aim and employment until the day you took me from our home. Of my own desolate and prospectless future I scarcely dared to think or speak to you ; but once you said, that if any one dared to cast an imputation upon me not consistent with honor, I should call on you to defend me ; that you should therefore now write and speak as you do I can only impute to your yielding to the suggestions of those who, under the garb of friendship, are

daring to interfere between us ; but it is not in their power to know whether your happiness will be insured by endeavoring to work my utter ruin. I cannot believe it ; and implore you, Edwin, for God's sake, to trust to your own better judgment : and as I am certain that your heart will tell you, I could not seek to injure you, so likewise I am sure your future will not be brighter if you succeed in crushing me more completely, in casting disgrace upon one who has shown no higher pride than the right of calling herself your wife.

(Signed)

CATHARINE FORREST.

To which he answered in a letter of January 2, 1850, (fol. 2009) :

B.

This is an answer to Mrs. F.'s Letter marked B

I answer your letter dated the 29th, and received by me on the 31st ultimo, solely to prevent my silence from being misunderstood.

Mr. Godwin has told me that the tardy reply to the most material part of mine of the 24th was sent by his advice. I should indeed think, from its whole tone and character, that it was written under instructions. I do not desire to use harsh epithets or severe language to you : it can do no good. But you compel me to say, that all the important parts of yours are utterly untrue. It is utterly untrue that the accusations I now bring against you are "new." It is utterly untrue that since the discovery of that infamous letter, which you so callously called "foolish," I have ever in any way expressed my belief of your freedom from guilt. I could not have done so, and you know that I have not done it. But I cannot carry on a correspondence of this kind. I have no desire to injure nor to crush you ; the

fatal wrong has been done to me, and I only wish to put a final termination to a state of things which has destroyed my peace of mind, and which is wearing out my life.

(Signed)

EDWIN FORREST.

New York, Jan. 2, 1850.

In her letter of the 29th December, 1849, she refers to what she calls "*a foolish and anonymous letter*," viz. : a letter which Mr. Forrest found in her drawer, and which, during the trial of the issues, was usually called the "CONSUELO LETTER."

It was written and sent to her, privately, by George W. Jamison, the actor before alluded to, who was then a married man, but was never shown by her to Mr. Forrest; she retained it amongst her private papers. It will be found at *folios 1095 to 1100 of the Case, and is as follows* :

(Schedule A.)

"And now, sweetest Consuelo, our brief dream is over and such a dream ! Have we not known real bliss ! Have we not realized what poets love to set up as an ideal state, giving full license to their imagination, scarcely believing in its reality ! Have we not experienced the truth that ecstacy is not a fiction ? I have ; and as I will not permit myself to doubt you, am certain you have. And oh ! what an additional delight to think—no, to know—that I have made some hours happy to you. Yes, and that remembrance of me may lighten the heavy time of many an hour to come. Yes, our little dream of great account is over ; reality stares us in the face. Let us peruse its features. Look with me and read as I do, and you will find our dream 'is not all a dream.' Can reality take from us, when she separates and exiles us from each other—can she divide our souls, our spirits ?

Can slander's tongue or rumor's trumpet summon us to a parley with ourselves, where to doubt each other, we should hold a counsel? *No! no!* a doubt of thee can no more find harbor in my brain, than the opened rose shall cease to be the hum-bird's harbor. And as my heart and soul are in your possession, examine them, and you will find no text from which to discourse a doubt of *me*. But you have told me (and oh! what music did your words create upon my grateful ear) that you would *not doubt me*. With these considerations, dearest, our separation, though painful, will not be unendurable; and if a sombre hour should intrude itself upon you, banish it by knowing there is one, who is whispering to himself, Consuelo.

There is another potent reason why you should be happy—that is, having been the means of another's happiness; for I *am* happy, and with you to remember, and the blissful anticipation of seeing you again, shall remain so. I wish I could tell you my happiness. I cannot. No words have been yet invented, that could convey an idea of the depth of that passion, composed of pride, admiration, awe, gratitude, veneration, and love, without being earthy, that I feel for you.

Be happy, dearest; write to me and tell me you are happy. Think of the time when we shall meet again; believe that I shall do my utmost to be worthy of your love, and now God bless you a thousand times, my own, my heart's altar.

I would say more, but must stow away my shreds and tinsel patches. Ugh! how hideous they look after thinking of you.

ADIEU! adieu! and when thou'rt gone,
My joy shall be made up alone,
Of calling back with fancy's charm,
Those halcyon hours, when in my arm,
Clasped Consuelo.

when handed to her, and had no suspicion of any impropriety therein. She says it had lain in the drawer in which it was found from some time in August, 1848, until its discovery; that the drawer was generally unlocked; when locked, could be opened by a key which Mr. Forrest carried, and with which he had opened that drawer for Mrs. Forrest in July, 1848."

Jamison was not examined as a witness in the case, but said in a *card*, published in the *New York Herald*, that he wrote the letter partly from being offended at Mr. Forrest, who had him cast in an inferior character of a play, and partly from regret at parting from Mrs. Forrest, whose society had been most agreeable to him, having, just before the letter was written, indulged "rather freely in wine." He calls it a "silly yet culpable rhapsody" (folios 2514 to 2517). Mrs. Forrest (he says), shortly after reaching Pittsburgh, wrote him a letter, administering to him a very decided rebuke for what he did, promising him forgiveness, however, on condition that he should never mention her having so addressed him, and would, immediately on reading her letter, burn it, which he did (folios 2519, 2520).

The letters already set forth in this statement show how exalted an opinion Mrs. Forrest had of her husband up to the time of their separation. She alleges nothing against him, but speaks of his character and conduct as "noble." The discovery of this "Consuelo" letter, and the proceedings and information incident to that discovery, produced in the mind of Mr. Forrest a deliberate conviction that his wife had been unfaithful to him, and this led to his taking proceedings against her in *Philadelphia* for a divorce, before September 1850. (See folio 114.)

On the 2d of September, 1850, she commenced a suit for a limited divorce against him, and obtained a writ of

NE EXECUT. (See complaint and affidavits, folios 2104 to 2229.)

That writ was discharged. See opinion of EDWARDS, Justice, whose Judgment was affirmed at General Term (folio 2274).

The opinion of the Court being given by the HONORABLE JOHN W. EDMONDS, P. J. (See folio 2214). The answer of Mr. Forrest in that suit will be found at folios 2282 to 2321. While such former suit was pending she commenced the present. After the interlocutory judgment for divorce, in this suit, Mrs. Forrest became an actress, and adopted the stage as her profession; having studied and prepared herself for that mode of life, while separated from Mr. Forrest.

In the year 1853 she went to California, arriving there in May of that year (folio 1899), and became the manager of the METROPOLITAN THEATRE, the principal dramatic establishment of SAN FRANCISCO. (See folios 3063 to 3072). Thence she went to Australia, thence to England, and returned to New York in December, 1858. (fol. 1899).

During all the time she resided apart from Mr. Forrest, she had living with her and maintained one or more of her family; having three sisters, viz.:

Margaret, who married a Mr. Voorhies; Virginia, who married a Mr. Ferdinand Vassault; and Annie, who is still unmarried.

There is no surviving issue of the marriage of Mr. and Mrs. Forrest.

Other facts material in the case will be referred to under appropriate points; but it is proper here to mention, that in no part of the case was there any attempt to show, or even an allegation, that, during all the time the parties resided together, Mr. Forrest ever treated his wife otherwise than with the most considerate kindness,

affection, and respect, nor that she ever made any charge whatever against him affecting his character until she did so in the answer to his complaint for divorce.

POINTS.

I. JURISDICTION.

FIRST. The Superior Court had not jurisdiction of the present suit.

1. At *common law*, the Court of Chancery had no jurisdiction in matters of divorce. It belonged *exclusively to the Ecclesiastical Courts and to Parliament*.

During our colonial existence there was no authority in any Court of this State to grant a divorce. That jurisdiction was vested, by the act of 1787, in the Court of Chancery.

Burtis vs. Burtis, Hopkins B., 557.

2. By the Constitution of New York, of 1821, article 5, section 5, providing for the division of the State into Circuits, and the appoint-

ment of Circuit Judges, it was declared thus: "And such equity powers may be vested in the said Circuit Judges, and in the County Courts, as the Legislature may by law direct, *subject to the appellate jurisdiction of the Chancellor.*"

Article 7, section 2, of the same Constitution, provided that no new Court should be instituted, except such as should proceed according to the course of the common law, "*except such Courts of Equity as the Legislature is herein authorized to establish.*"

3. In *Ames vs. Blunt*, 2 Paige, 95, the Chancellor held that the powers of the Court were derived from the Constitution, and it was not competent for the Legislature to confer those powers on any other tribunal.
4. The Constitution of 1846 abolished the Court of Chancery and provided for "a Supreme Court, having general jurisdiction in law and equity." It gives the Legislature the same power "*to alter and regulate the jurisdiction and proceedings in law and equity as they have heretofore possessed.*"

Thus the whole jurisdiction as to divorce cases seems to have been vested in the Supreme Court, as the successor of the Court of Chancery, without any authority in the Legislature to confer it on any other tribunal.

5. But if the Legislature had such authority, it has not exercised the power. The Code, section 33, provides that "The jurisdiction of the Superior Court of the city of New York, of the Court of Common Pleas for the city and county of New York, of the Mayors' Courts of cities, and of the Recorders' Courts of cities, shall extend to the following *actions*," viz., those mentioned in sections 123, 124. Amongst these, *suits for divorce are not enumerated*. But jurisdiction is given also to "*all other actions* where all the defendants shall reside, or are personally served with the summons within the city and county of New York." The Code, section 2, defines *an action* to be "an ordinary proceeding in a court of justice, by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."

The Superior Court decide—

- A. That this is an *action* within the meaning of the Code.
- B. That the defendant was a resident of this State when this suit was commenced, in November, 1850. ♦

We insist—

- (a.) That, whether it is an action or not, it is not one of those jurisdictions over which the Legislature could, or did, in fact, confer on the Superior Court.
- (b.) That it is not an action *on a contract*, for although marriage is declared by statute to be a civil contract, not requiring any peculiar form of solemnization, yet, in jurisprudence, the *relation* of husband and wife is not a contract. (See *Paige on Divorces*, p. 60.)
- (c.) It is not an action merely because it was commenced by bill, or complaint, for there are many proceedings so commenced, of which the Supreme Court confessedly has exclusive jurisdiction. (See of some them in 1 *R. S.*, 418, 422 [*2d ed.*, 610] ; 1 *Ib.* 730 ; 2 *R. S.*, 463, *sec.* 35.)
- (d.) The jurisdiction in divorce cases being vested in the Supreme Court by the Constitution and the Judiciary Act (*Laws of 1837*, page 323, *sec.* 16), will not be deemed to have been taken away or interfered with, except by the express provision of a subsequent act or by necessary implication. "The two must be *so repug-*

nant that they cannot stand together or be consistently reconciled, and then the latter one will prevail."

McCarty vs. The Orphan Asylum, 9 Cow., 437.

7. Barbour's S. C. R., 191.

1 Blatchford's C. C. R., 608.

- (e.) The defendant was *not* a resident of this State when served with the summons. There is nothing to contradict the proof that at some time in 1849, after *permanently separating from Mrs. Forrest*, he returned to his former home at Philadelphia and resumed his residence with his sisters.

He accompanied such resumption of residence with the remark at the dinner-table in Philadelphia, "*Now, this is my home; I have no other.*" On this point, the testimony of his sister *Henrietta* is clear, explicit, and uncontradicted. (folio 273.)

For Law of *Domicil*, see 2d *Parsons on Contracts*, p. 90.

II. POINTS ON EXCEPTIONS TAKEN DURING THE TRIAL OF THE ISSUES.

FIRST. The Court erred in admitting the *Memorial for Divorce*, set out at folio 126. It had already been shown that Mr. Forrest, on the 7th Au-

gust, 1850, petitioned the Court of Common Pleas, of Philadelphia, for a divorce. The paper afterwards offered was a memorial of the same date, for the same relief, alleged to have been presented by him to the Legislature of Pennsylvania. If the proof were relevant, it related to the *seventh* issue (folio 65), "*whether, at the time of the commencement of this action, the said defendant was a resident of the State of New York.*" In his answer, he alleged that he had removed to Philadelphia in *May, 1849*. The memorial asserts that he resided in New York until about the first day of *December, 1849*. The plaintiff's counsel desired to show defendant's self-contradiction as to date, with a view to prove that he had not, in fact, changed his residence, and also, no doubt, to demoralize defendant's case. There was *no proof of defendant's signature to the memorial, nor was the original produced*, and the reading of the copy was objected to as being a copy, the absence of the original not being sufficiently accounted for. (See *exceptions, folios 132, 146.*) Notice was given to the defendant to produce the original, and there was proof that search was made for it at Harrisburgh, the seat of government of Pennsylvania. On these facts, the Superior Court held that the exception was not well taken. (*Folios 3504, 3505.*)

On this point we allege:

1. That the *existence of the original was proved*, and there was *no proof of its loss or destruction.*

2. The Superior Court do not declare specifically whether, in their opinion, the paper found in the Clerk's office of the House of Representatives by Condit, the plaintiff's witness (folio 144), was or was not the original. They say "it (the original) could not be found, *unless the paper actually found was the original petition. The paper read is proved to be an exact copy of one so found..*"

But there was *no proof* that the one so found was the original.

3. The decision of the Superior Court on this point rests on the following paragraph in its opinion :

"The testimony showed DISTINCTLY that THE ORIGINAL WAS GIVEN TO THE DEFENDANT to be carried to Harrisburgh, where the Legislature was in session at the time. If he carried it according to the direction given to him, THEN proper search was made, and the evidence was CLEARLY SUFFICIENT to show *prima facie* that the paper found was the one carried by him, and delivered. If he did not carry and deliver it, then, *presumptively*, it still remained in his possession, and secondary evidence was proper."

We respectfully submit that the whole of this paragraph, and every portion of it, is fallacious, in fact and in law.

- A. The law on this subject, as to reading a copy, will be found in *1st Greenleaf's Evidence*, sec. 558.

B. The whole evidence adduced to justify reading the copy was that of *Theodore Sedgwick* (folios 124 to 130), *William Ellery Sedgwick* (folios 131, 132), *Thomas Whitely* (fol. 132), *Neil Gray* (fol. 133), *Francis H. Dykers* (fol. 134), *Charles Condit* (folios 135 to 146). Not one of these proved that the handwriting of defendant was upon any paper about which they testified.

C. Even if defendant had carried the original to Harrisburgh and delivered it there at the place or places which Condit searched, it does not follow that the paper which Condit found was the original. It may have been a copy, and he testified, in answer to a question by the Court (folio 145), that he "*could not say that the word copy was on the paper in the Clerk's office*"—that is, he had no recollection whether it was or was not. Therefore, the evidence was *not* sufficient to show "*prima facie* that the paper found was the one" carried by defendant.

D. If defendant did not carry the paper to Harrisburgh, the law would not presume it to be in his possession, for he might have lost or destroyed it, or given it to another person to be delivered.

E. But the overwhelming difficulty with the argument of the Superior Court is, that there was NO EVIDENCE WHATEVER *that the original was given to the defendant to be carried to Harrisburgh*, although the Superior Court says this was "DISTINCTLY" proved.

The only testimony, having the slightest approach or relation to any such conclusion, is that of Theodore Sedgwick, who drew the original. He says, the *copy* was made by Mr. Dykers, and the notice by young Mr. Sedgwick, adding: "I only recollect generally about it; I don't know that I ever saw the original with Mr. Forrest's signature; *it was DIRECTED TO BE sworn to and given to Mr. Forrest to be carried to Harrisburgh, where the Legislature was in session at the time*" (folios 124, 125). But *no one says the direction given by Mr. Sedgwick was followed; no one says that the original was ever handed to defendant; and Mr. Dykers, who copied the Memorial, says he does not know whether he "copied it from a draft or from an original, or whether it was signed or not"* (folio 131).

Thus it follows, that the Superior Court, from misapprehension as to the evidence, plainly erred in sustaining the decision at General Term overruling this exception.

SECOND. The Court erred in allowing the question put to Mrs. CHRISTINA UNDERWOOD on cross-examination, at folio 208.

She had resided in this country since 1837 ; knew Mrs. Forrest a short time before her marriage ; was acquainted with the family from the time the witness was about eighteen years of age (folios 148, 149). When Mr. and Mrs. Forrest were going to Philadelphia, towards the end of 1837, they requested her to take charge of their house in Reade street, where she continued to reside with her family over two years. When Mr. and Mrs. Forrest went to reside in Twenty-second street, witness went to reside with them. Afterwards she went abroad. Again lived with them from January, 1846, to May, 1847. *Mrs. Voorhes* used to come to the house in a clandestine manner (fol. 154). Witness related (folios 156 to 160) some suspicious circumstances about the intercourse between N. P. Willis and Mrs. Forrest, and other facts, at considerable length, tending to throw doubt upon the chastity and fidelity of Mrs. Forrest. On *cross-examination*, in the attempt to show that her testimony was in the main fabricated and untrue, she was asked, amongst other things, to whom she had related what she saw in regard to Mrs. Forrest's conduct, and said (fol. 208), " I first made the communication to Mrs. Lent, and then to Mr. James Lawson. I understand him to be the agent of Mr. Forrest. I told him in his own office. I went there on private business of my own."

" Q. *What was that private business ?* "

" Defendant's counsel objected to this question, as irrelevant and incompetent ; the

Court overruled the objection. Defendant's counsel excepted."

It was supposed that this question was clearly irrelevant, and, at the argument before the General Term, Mr. Van Buren, who appeared for the defendant on that occasion, cited, in support of the objection to the testimony,

Greenleaf's Ev., 1 vol., 52, 448, 449, and
Van Buren vs. Wells, 19th *Wendell*, 203,

which holds that "*To authorize the introduction in evidence, upon the trial of a cause of any PARTICULAR FACT OR CIRCUMSTANCE, if objected to, the party offering must show its relevancy, by reference to the testimony already given, or to facts to be subsequently proved on his part.*"

What was her private business with Mr. Lawson was clearly immaterial. But the Superior Court say that the credit of a witness may be impeached (folios 3507, &c.) by showing great partiality for the party calling him, and officious acts in inciting or aiding the action or prosecution.

The witness answered to the question, "*I went to ask Mr. Lawson's opinion if it was proper for my son's boss to send him out so much ; I never had occasion to ask his opinion before ; I went to ask him several times about money, and told him I had been obliged to go to the pawn-broker's ; I had formerly said to him, 'If people were honest, and acted upright and downright, I should not have so much trouble' ; and he asked me, when I went to consult him about my son, what I meant by that expression on the former occa-*

- *sion ; that was the way the conversation about Mr. and Mrs. Forrest commenced* " (folios 209 *et seq.*)

The Superior Court say :

" Although her first answer to the question was, that she went to ask Mr. Lawson's opinion if it was proper for her son's boss to send him out so much, yet her further testimony as to what she said to Mr. Lawson about the plaintiff (Lawson being known to her as the intimate friend of defendant,* and the reasons assigned for then making the disclosures which she said she did make, in connection with other testimony given by her) *may have satisfied the jury that the whole purpose of her visit was to give the information she communicated, and that she was not induced to give it MERELY to satisfy her own conscience.*"

Upon this, we remark :

1. As already shown, the law requires the relevancy of a question to appear at the time it is put.
2. That *did not appear* in this instance.
3. The Superior Court admits impliedly, and it cannot be questioned, that *what was said in response to the question about Mrs. Underwood's private business, was irrelevant, and if stated in*

*When Mrs. Underwood spoke of Mrs. Forrest to Mr. Lawson, he said (fol. 210), "*that he would as soon have suspected an angel from Heaven as Mrs. Forrest.*" And the proof shows that he had always been a sincere friend of Mrs. Forrest.

an offer of proof would have been, certainly *should have been*, ruled out. This seems to illustrate the propriety of the exception, and the good sense of the rule on which it was founded.

4. It is important to note here upon what a small amount of evidence the Court supposed that a jury might be satisfied of Mrs. Underwood's willingness to commit perjury, as contrasted with what we will see it assumed to be the nature and quantity of proof to condemn another woman for adultery. We submit, that the relevancy of testimony is not determined *by the question whether or not it may satisfy a jury.*

The very reason for keeping out irrelevant proof is, lest it may produce *just that result.*

5. We do not perceive how its being Mrs. Underwood's "whole purpose" to give the information is at all inconsistent with the inducement to impart it, "merely to satisfy her conscience."

The learned Court also remarks, that the question was not irrelevant, *judging by the evidence elicited.* The reason assigned is, that the jury may have been induced to think that Mrs. Underwood was officious in communicating charges which she did not before consider it a duty to mention, and

which related to conduct she did not think required her to leave the house, or inform the defendant.

If this be designed as a declaration that a servant, who witnesses improper conduct on the part of a married lady, should either quit the place of service, or inform the husband, we say that while we will not dispute the morality of such a rule, we know what is likely to be the result of the suggested course to a servant, and how prone servants, while well treated, are to conceal rather than expose the secrets of a family, or to leave a place in which they have long resided, except from the most pressing emergency.

It does not strike us as very "*officious*" for Mrs. Underwood, in a private conference with Mr. Lawson, "*nearly if not quite a year*" after Mr. and Mrs. Forrest had separated, to mention to him, whom she knew to be an upright gentleman, what she had seen in Mr. Forrest's house, especially as (folio 210) she did not "*go into particulars.*"

We submit, also, that the answer showed the *irrelevancy* and *impropriety* of the question objected to. It compelled the witness to disclose her *extreme poverty*, and thus furnished a jury with the means of suspecting sordid motives in testifying. The experience of our profession has demonstrated that, in controversies of this character, juries are likely to exhibit much prejudice against the man, and sympathy for the woman. It is only by the interposition of an intelligent and fearless judiciary, that the husband's

rights may in such cases be rescued from sacrifice.

When the witness said she went to Mr. Lawson's office on private business of her own, we claim that the cross-examining counsel was *bound by that answer*—not that he was "*bound to take*" it "*as true.*" We agree with the Superior Court, that no such obligation as the latter rested upon him. Whether she had private business or not was one thing—the nature of it, quite a different thing. What it was, we think was wholly irrelevant.

THIRD We claim that *several errors* were committed at the trial, in rulings as to the examination and attempted impeachment of a witness for the defense, named ANNA FLOWERS, whose maiden name was ANNA DEMPSEY. The exceptions, in this respect, will all be considered under the present point.

Her examination *begins* at fol. 329. She was born in Ireland—went to live as servant with Mr. and Mrs. Forrest in May, 1844, being then (fol. 339) about *fifteen years of age*. She remained with them until April 1st, 1845. After leaving Mrs. Forrest, and on the 23d January, 1847, she married George W. Flowers, an inspector of beef and pork (folios 329, 344). She proved acts of close familiarity between Mrs. Forrest and N. P. Willis (folios 331 to 335), and that *she saw Captain Howard in bed with Mrs. Forrest in the bed-room of Mrs.*

F. at night, when Mr. Forrest was absent from the [city (folios 335 to 340). She testified also to other facts criminating Mrs. Forrest.

On her *cross-examination*, she was asked (fol. 376):

"You have mentioned about your first child. When was that child born, and who was its father?"

"The defendant's counsel objected to such question, as irrelevant and improper, and also asked the Judge to instruct the witness that she was not bound to answer questions relative to the birth or parentage of that child, tending to degrade her, but the Judge refused so to instruct said witness."

"To the decision, defendant's counsel excepted" (fol. 377). She then stated that the child was born in May, 1845, and Captain Howard was the father. Her intercourse with him took place at Mr. Forrest's house, in 1844.

She further stated, in answer to questions on cross-examination (folios 377, 378), "I was not in bed in that house, in the summer of 1844, with McCabe, the waiter; I never had intercourse with him; he was nothing but a small dirty boy."

The *re-direct* examination being resumed, the witness stated, *without objection*, under what circumstances her intercourse with Captain Howard occurred (folios 385 to 388), and to interviews between the witness and Mrs. Forrest on that subject. The tendency of this account was, to show that Mrs. Forrest had connived at the intercourse, with a

view to prevent the disclosure of her own guilt with Captain Howard, and that she (Mrs. Forrest) and her sister *Margaret* (afterwards *Mrs. Voorhees*) had provided for Anna and the child.

See folios 888 to 895.

After the plaintiff's case had been resumed, her counsel called *John Dickinson*, a shoemaker, who resided in New Canaan (Connecticut), to whom, on the 30th or 31st March, 1840, *Anna* was bound as an apprentice from the House of Refuge. She lived with him from March to November, 1840. He alleged her general character, for truth and veracity, to be bad (folio 1323). The following question was then put to him :

" Did you hear or witness any speech or act of Anna Dempsey, while living with you, indicating that she was an unchaste and lewd person? "

"Defendant's counsel objected to this question, as irrelevant and incompetent.

"The Justice decided to allow ANY EVIDENCE tending to show *Anna Flowers'* want of chastity, previous to the occurrence with Howard, to which she had testified, and overruled the objection (folio 1325).

"The defendant's counsel excepted to such decision. The answer showed that Anna knew he always got up to light the fire. At her usual time for rising in summer, she came out of her bedroom undressed, without being called for. He asked her why she made her appearance in that condition, and didn't recollect her reply."

Under the above ruling, the following witnesses were called by the plaintiff, and examin-

ed as to *specific acts of Anna, tending to show her want of chastity*:

Mrs. Harriet White (folio 1398).

Harriet White, Junior, her daughter (folio 1402).

James Curzon (folio 1405).

Bernard McCabe (folios 1406 to 1422), who swore, amongst other things, that he had sexual intercourse with Anna in Mr. Forrest's house. Reading the testimony of this witness will show at once that he was unworthy of the slightest credit.

Catharine Levins (folio 1368).

It will thus be seen that the Superior Court held it proper not to prevent Anna Flowers from testifying to the birth and paternity of an illegitimate child, nor to advise her as to any privilege she might have in regard to questions tending to degrade her, and the Court held it also proper to *try her on various charges of specific acts of indecency, indelicacy, or want of chastity*. In all these respects we suppose the Court clearly erred.

1. By the settled laws of this State, it is not competent to impeach the credit of a female witness by showing that she is a common prostitute.

Bakeman vs. Rose, 18 Wend., 246.

2. Such proof, or proof of specific acts of unchastity, would not be admissible even in

rape cases, according to the law as it existed in the State before the decision in *Abbott vs. The People*, 19 Wend., 192, which makes an exception in reference to rape cases, for plain and satisfactory reasons.

3. It is a general rule that when a witness on his cross-examination *denies* a particular fact, going barely to impeach his general character and credit, witnesses cannot be called to contradict him.

Morgan vs. Frees, 15 Barbour, 352.

4. A witness cannot be contradicted as to any statements made by him on cross-examination, as to matters collateral to the issue.

1st Greenleaf's Evidence, §§ 448, 449.

5. The only evidence admissible to impeach a witness, because of his *character*, is that which relates to his *general* character or *reputation*. Proofs of particular facts cannot be legally received.

1st Greenleaf's Evidence, § 461.

Bakeman vs. Rose, *ut supra*.

- 6 A witness is privileged from answering any question, the response to which may tend

to degrade him or her, unless the answer is relevant to the issue.

1st Greenleaf, §§ 454, 455, 456.

7. It is the duty of the Court to instruct a witness as to privilege, and to decide on all the circumstances whether the answer might tend to degrade, and whether an answer should be compelled.

1st Greenleaf, § 451.

All these rules are simple, just, and well established, and yet each of them has been plainly violated in the rulings mentioned under this Point. How those rulings are justified will appear from the opinion of the Superior Court at General Term, which we now proceed to review, and will attempt to answer.

- A. In regard to the question put to Anna Flowers, the principal argument seems to be, that she *had already testified* to having an illegitimate child, and to facts which would induce the belief that she was got with child when about fifteen years of age, by Captain Howard, while in the service of Mr. Forrest. This argument is founded on what Anna said at folios 340 to 344. After stating, "*Mrs.*

Forrest, before she went away (in December, 1844—see folio 330), gave me thirty dollars and some baby clothes,” she was asked :

“ Since her return, have you mentioned THIS OCCURRENCE to her ?”

“ This occurrence,” means the fact of Mrs. Forrest and Captain Howard being in bed together, as will appear by reference to folio 340. In answer to this question, calling only for what she said on that subject, she proceeds to tell about the child, &c. ; but does not, in terms, state that it was illegitimate, nor when it was born, nor whether Captain Howard was the father of it ; though we do not mean to say that such conclusions were not capable of being inferred from what she stated.

“ It is difficult to perceive,” says the Superior Court (folio 3514), “ how it could tend to degrade her, after having testified to so much, to state the precise day on which the child was born, and the name of the father.”

“ Whether the child was born one or two years before her marriage was immaterial, so far as it affected the question of her degradation, and swearing expressly that Captain Howard was the father of the child was but an unqualified declaration of a fact clearly intimated by her direct examination.”

“ The objection was not taken by the witness.”

* * * * *

“ The defendant could not exclude an answer merely on that ground.”

The Court then proceeds to say, in effect, that she had waived her privi-

lege, by testifying to these same matters on her direct examination. (*folios* 3515, 3516.)

- (a.) The rule, as stated in Greenleaf, is that the witness may claim the protection, at any stage of the inquiry, whether he has already answered the question in part, or not at all.

1st Greenleaf's Evidence, § 451.

- (b.) It *might* make a difference in the *degree of Anna's degradation*, whether she surrendered her virtue at fourteen, or sixteen years of age, the moral capacity to resist being greater at the latter than the former age.

She might think, and many intelligent and good persons agree with her, that if she had resolved to gratify her lechery, it was base to do so in the house where she resided, and with Captain Howard, whom she knew to be the lover or paramour of her mistress — a mistress in regard to whom she states (fol. 343), "*Her treatment of me WAS ALWAYS VERY KIND.*"

- (c.) Anna had *not* stated under oath that she

had had a child before her marriage. She had merely sworn *that, in a conversation with Mrs. Forrest at New Orleans, in 1848, she spoke of a child* as if she had had one, and about Captain Howard being asked to do something for it. The whole conversation may have occurred, and yet she might never have a child. *And, if she had never borne one, she could not be indicted for perjury because of any statement contained in her direct examination, even if such statement were material to the issue.*

- (d.) The error of the Judge was, in *refusing to give the instruction prayed for, "that she was not bound to answer questions relating to the birth or parentage of that child,*
TENDING TO DEGRADE HER.

Even if she had stated, "*I had an illegitimate child begotten at Mr. Forrest's house, and Captain Howard was the father,*" yet *other* questions on that subject might be put, tending to degrade her, and yet she was left *wholly uninstructed* whether she might refuse to answer them.

Sothard vs. Wrexford, 6 Cowen, 254, was an action for breach of promise of marriage. The defendant set up that plaintiff had been unchaste. One *Aylesworth*, being on the stand, was asked, "*if he ever knew of any person*

having criminal connection with the plaintiff?"

The Judge told the witness, he need not consider that question as including himself; that he was not bound to say anything respecting himself.

The counsel then claimed to put the question, including the witness. The Court interposed and overruled the question, protecting the witness from even setting up the privilege. We refer to the remarks of the Circuit Judge (Walworth) on this point. Plaintiff had a verdict.

Although the Supreme Court thought the Judge erred in preventing the defendant from asking Aylesworth the general question above mentioned, they did not grant a new trial. Sutherland, J., says: "The witness was not bound to answer the question, so far as the answer would criminate himself, *and it was the duty of the Court to apprise him of his right in that respect.* But if a witness *under such circumstances thinks proper to waive his privilege,* I do not understand it to be the duty or right of the Court to *force* it upon him, and to deprive the party of the benefit of such disclosure as he may *voluntarily* make."

As to the *materiality* of the question put to Anna Flowers, the Superior

Court says (folio 3518): "*Thus circumstances of suspicion, involving the plaintiff in complicity with her alleged paramour, in a matter disgraceful to herself, and tending to show her depraved sense in regard to the unchaste and libidinous conduct of the witness and a visitor at the house, were MOST CLEARLY a proper subject for inquiry and explanation by the plaintiff, after the DEFENDANT had thought proper to open the inquiry.*"

So that, because Anna Flowers, in answer to question about *what she said to Mrs. Forrest about seeing the latter in bed with Captain Howard*, and *nothing else*, related, amongst other things, a story of her own seduction, and Mrs. Forrest's connivance at it, the defendant thereby made it an issue in the cause, *not whether she said what she testified to having stated, but whether what she thus said was true*; and that issue was thereupon added to the specific issues framed by the Court, and to be tried in the same manner.

As to this, we say :

- (a.) We do not understand the law to be that a defendant, by proving, *without objection*, an *irrelevant narrative*, or *irrelevant facts*, opens an inquiry as to whether such narratives or facts are true; nor does he waive the right to object to any such inquiry, as irrelevant.

(b.) Whether *Captain Howard, Barney McCabe*, or another person, was the father of Anna's child, was wholly irrelevant, as was also the child's age, or place of birth.

(c.) Upon what ground was it relevant to inquire whether Mrs. Forrest connived at Anna's being debauched, and afterwards agreed to provide for her and her offspring?

This we will consider hereafter.

In *Lohman vs. The People*, 1 Comstock, 379, the defendant was convicted of procuring an abortion on the person of one *Maria Bodine*, who swore to becoming pregnant by one *Cook*, in May, 1846. On cross-examination, she was asked

"*Had you any sexual intercourse with any other person than Cook prior to April, 1846?*"

"*Had you during the fall of 1845, or winter of 1846, the venereal disease?*"

"*Had you any sexual connection with any other person than Cook between July, 1845, and 1846?*"

The witness declined to answer, upon the ground that her answers would *tend to disgrace her*. Yet she had already sworn to *bring unchaste, and consenting to an abortion*. It is difficult to perceive how her answering these ques-

tions would tend to degrade her more. But the Court *would not compel her to answer*, and the defendant excepted, supposing that whether it was Cook who got Maria with child, as she stated, was a material fact about which the witness might well be cross-examined, and that if she admitted having the venereal disease during the period covered by the question, it might be shown by medical authors and witnesses that this circumstance would lessen the chances of her conceiving at the time she said she became pregnant. It was denied that she was ever in that condition.

The Court, *Gardiner, J.*, delivering the opinion, say (page 285), "It is hardly necessary to say that the answer sought to the questions would have disgraced the witness. She was therefore privileged from answering, *unless her answers were material to the issue.*" After declaring that they would not be, the Court then say: "The privileges of witnesses have been carried much further in some cases, but all the authorities agree that where, as in this case, *the object of the question is, to impair the credibility of the witness, she could not be compelled to answer.*"

- B. The views of the Superior Court, in regard to the testimony of John Dickinson

and others, about specific acts of misconduct on the part of Anna Flowers, are stated in the opinion at *folio* 3645. The Court seem to concede that this proof was not strictly admissible as *mere impeaching evidence*, and seek to justify it on other grounds. They refer to the testimony of Anna as to the intercourse of Mrs. Forrest with Captain Howard, and the connivance between them, that the Captain should seduce Anna, and then say: "*This evidence, if true, could PROPERLY be made to subserve OTHER PURPOSES in the cause than to establish the fact that the plaintiff herself had been guilty of illicit intercourse with Howard.*"

"If true, it proved that she had knowledge at the time that Howard, whenever it suited his pleasure or convenience, was indulging in her house IN IMPURE INTERCOURSE WITH ONE OF HER DOMESTICS, and, that having such knowledge, she retained the one in her house as an acceptable visitor."

"NO ONE CAN DOUBT that such evidence of the plaintiff's LEWD DISPOSITION AND HABITS would be COMPETENT EVIDENCE in this action against her, EVEN IF THE ANSWERS HAD NOT ALLEGED ANY IMPROPER INTERCOURSE BETWEEN HERSELF AND HOWARD."

The Court then argue that if Anna Flowers, when she had intercourse with Howard, instead of being "a pure and unsophisticated girl of fifteen," was unchaste and indiscriminate as

to intercourse with men, "A JURY MIGHT, *in connection with the other evidence in the case relating to the same subject*, CORRECTLY CONCLUDE, *not merely that there was NO IMPROPER INTERCOURSE between the plaintiff and Howard, but that she was not conscious that any improper intercourse was occurring either between her servants or between them and any other person.*"

In reference to these views, we suggest :

- (a.) The argument just stated proceeds on the assumption that it would be relevant for the defendant to prove, *as an independent fact in the case*, that Mrs. Forrest, though not guilty of adultery with Captain Howard, yet permitted lewd practices in her household.

We do not understand this to be the view taken by the Court, when other questions in the case were considered, as will presently be shown.

- (b.) But even if such proof would be relevant, and were given by Anna Flowers, the rules of evidence, as we understand them, would not permit her statement to be impeached, by proving that she was an unchaste woman, in the manner adopted at the trial.

Whatever may have been the fact to which she testified, she could neither be contradicted nor impeached by proving specific acts of misconduct against her.

- (c.) And we do not perceive how a conviction in the mind of the jury, that she had parted with her chastity, before her intercourse with Captain Howard, would, according to the law of evidence, legally justify the conclusion that her statement as to Mrs. Forrest's connection with Howard was false.

The Court also say, that the evidence under consideration was both relevant and material, because Anna Flowers had, on her direct examination "*represented herself as afflicted even unto tears, and on her cross-examination, as agitated and alarmed, by the conduct of the plaintiff and Howard.*" And the Court add, "*the whole drift of her examination, in this respect, was a representation of herself as a MODEST CHILD, whose sense of propriety was greatly shocked by what she witnessed: surely it was competent to show that this representation of herself, made on her direct as well as cross-examination, was sheer preterence and that her OWN HABITS OF LIFE were such as SHOWED HER TESTIMONY TO BE UNTRUTHFUL.*"

In regard to this we say :

- (a.) In her *direct* examination, Anna said *nothing about her intercourse with Captain Howard, or the circumstances attending it.*

That proof was elicited, as we have already seen, by questions *on cross-examination*, to which the defendant objected (*folio 377*).

This led to the examination of Anna, and her statement, without objection, as to how her intercourse with Captain Howard occurred.

- (b.) All these particulars were *entirely collateral*, and led the jury away from the legitimate inquiries which they were to answer.

- (c.) There is no proof about tears, &c., as is referred to in the opinion of the Superior Court.

FOURTH. The Court erred in overruling the exception stated at folios 554, 555. It arose thus :

“Defendant’s counsel offered to show that, at the time Mrs. Forrest was residing in Six-

teenth street, her house was visited by gentlemen without their wives, that they were furnished entertainment, and that there was drinking and DISORDER.

"That most unseasonable hours were kept, and the gentlemen, under those circumstances, were received separately, and INVITED TO THE SEPARATE ROOMS OF THE LADIES LIVING IN THE HOUSE.

"Plaintiff's counsel objected to such testimony; the Court sustained the objection, and held, that evidence of misconduct, on the part of the plaintiff, with OTHER MEN THAN THOSE WITH WHOM SHE WAS CHARGED IN THE ANSWER with having committed adultery, was inadmissible. To such decision, and every part thereof, the defendant's counsel excepted."

The Superior Court, in their opinion

(folio 3521), justify this ruling, and say, that the exclusion of the evidence did not deny to the defendant a right to prove the circumstances of any interview between the plaintiff and either of those persons, at that house, or the general or particular demeanor of the plaintiff, and either of them towards each other.

The Court then proceed to criticise the offer, *as not sufficiently pointed*, and argue what it was proposed to prove might all be consistent with correct deportment, on the part of Mrs. Forrest, and the entire respectability of her house.

(a.) The Court, in justifying the proof given against Anna Flowers, considered it

quite *material* to inquire whether Mrs. Forrest showed a "*depraved sense*" in regard to the *unchaste and libidinous conduct of the witness and a visitor at her house.* (Folio 3518.)

The offer rejected was to prove *just that imputation* upon her.

The Court also, in the same connection, held such to be pertinent and competent evidence upon the question whether the plaintiff was '*privity to the indecencies practiced in her own house, and was the lewd woman which the unreprieving head of a family, conscious of such things, and pleasantly allowing them to be repeated, would necessarily be deemed to be, and whether her house was but little better than a respectable house of assignation, presided over by the plaintiff, knowing what was done within it.*'

- (b.) We think the testimony under consideration would have been proper as bearing on these questions, if the ruling of the Superior Court as to Anna Flowers was correct.

The defendant also offered to prove by *Thaddeus Meighan*, that he was awakened on several occasions in the summer of 1850 by DISTURBANCES in Mrs. Forrest's house, opposite to that which he occupied in Sixteenth street.

That he saw *numbers of men, who were unknown to him, COMING OUT AFTER MID-NIGHT, and that several of them WERE INTOXICATED ; the evidence was excluded, unless it referred to some person with whom the answer charged that Mrs. Forrest had committed adultery (folio 1176).*

The defendant offered, by the same witness, to contradict the statement of Mrs. Forrest, contained in her affidavit of December 20, 1850, that she was not in the habit of giving expensive entertainments or receiving gentlemen at unseasonable hours.

(c.) In the argument of the Superior Court, supporting the decision excluding all this evidence they discuss rather the *effect, or sufficiency*, of the supposed testimony than the question whether it was or was not competent.

(d.) It is true, as stated by the Superior Court, that the defendant did not propose to prove that Mrs. Forrest kept an "as-signation house," or, as the Court express it (folio 3522), "a house to which gentlemen resorted to keep appointments which never should have been made, or to gratify passions which should be mortified, instead of being indulged;" and, it may be true, that what was proposed to be proved might, according to the ingenious argument

of the Superior Court, be consistent with morality and innocence. But, in all cases depending upon circumstantial evidence, the latter remark will apply. It is no reason for *excluding proof*, that it may be consistent with innocence, if it may reasonably tend, with other proof, to establish guilt. And where, as in this case, much proof had been given to show that Mrs Forrest, in the absence of her husband from the city, entertained people in his library until late hours, and herself had suspicious associations with gentlemen who visited the house, it would have been proper to receive evidence, showing that the management of Mr. Forrest's house by his wife, in his absence, and the nature of the proceedings there, were not such as, according to the general opinion and rules of society, are consistent with a proper regard by a wife for her husband's honor, or her own duty or reputation.

On this point, we refer to

- Poynter on Marriage, 193.
 Loveden *vs.* Loveden, 2 Hagg. Cons. R., 2.
 Burgess *vs.* Burgess, *Ib.*, 234-5.
 Grant *vs.* Grant, 2 Curtiss, 64, 66.
 Hamerton *vs.* Hamerton, 2 Hagg. Ecc. R., 8.
 Tucker *vs.* Tucker, 11 Jurist, 893.
 Page on Divorce, 112, 113.
 1 Hagg. Cons. R., 302, 303.
 2 *Ib.*, 23, 24.
 De Aguilar *vs.* De Aguilar, 1 Hagg. E. R., 767, 777.
 Durant *vs.* Durant, *Ib.*, 49.
 Ferguson *vs.* Ferguson.

FIFTH. The Court erred in allowing, on the cross-examination of *James Lawson*, the question in reference to *Mrs. Underwood*, at folio 599.

We have already submitted that an error was committed in *Mrs. Underwood's* examination, on this point. See 2d Point.

Even if she were properly questioned about her interview with *Mr. Lawson*, her answers concluded the plaintiff, and could not be contradicted.

1st Greenleaf's Evidence, § 449.

Howard vs. Fire Insurance Company, 4 Denio, 502.

SIXTH. The Court also erred in admitting the letter written by *Mrs. Forrest* to *Mr. Lawson* (*folios 611 to 614*), and the correspondence between them, extending from *folio 614 to 644*.

See Exceptions, *folios 611, 616, 619*.

The Superior Court seek to justify the introduction of these letters, on the ground that *Mr. Lawson*, when they were written, was acting as a species of *agent* for *Mr. and Mrs. Forrest*, and attempting to effect a reconciliation between them. It is said in the opinion (*folio 3538*), that "To a certain extent he may be regarded as a person authorized to communicate the views of each to the

other, in regard to a particular matter. What he wrote to the plaintiff in respect to it, while thus acting, and while known to the defendant to be thus acting, is not so CLEARLY irrelevant or improper THAT A NEW TRIAL SHOULD BE GRANTED on account of the admission of the letter of the 14th of November, 1849, ESPECIALLY when the contents of the letter itself are considered."

Again (folio 3541), "we do not think that there was any error in admitting either of the letters in evidence WHICH MAKES IT THE DUTY OF THE COURT TO GRANT A NEW TRIAL."

The implied concession that there was error here, but not of sufficient consequence to call imperatively for a new trial, comes to the aid of the defendant in discussing these exceptions. And :

1. That Mr. Lawson was agent of Mr. Forrest, or authorized to act for him, cannot be proved by Mr. Lawson's mere acts or declarations, in the absence of Mr. Forrest, and not shown to have been authorized or ratified by him.
2. Nor would the mere fact, that Mr. Lawson even with Mr. Forrest's knowledge, carried on with Mrs. Forrest the correspondence in question, make Mr. Forrest responsible for Mr. Lawson's acts or declaration .

Let us see, now, how the proof stood as to Mr. Lawson's authority when the letters were introduced.

He is a Scotchman, and although Mrs. Forrest was born in London, yet, being of Scotch parents, he said (folio 563): "We claim her as Scotch."

He became acquainted with her on her arrival in this country (folio 561), and says: "My relations with her were very intimate and very kind towards her." She requested him by letter (set out at *folio* 605) to write to her father, stating what had occurred between her and Mr. Forrest. He did so, and his letter appears at *folio* 571. These letters were shown by Mr. Lawson to Mr. Forrest (folio 565). When he exhibited the copy of what he had written to her father, Lawson says: "His precise words, when I showed him the copy of the letter I had written, I won't undertake to say; but I think he said, 'It will do.' I said to him 'it was a difficult and a delicate task to perform;' to which he replied, 'It's a good letter.'" (Folio 565.) When Mr. Lawson spoke to him about the separation, he said he would not speak on that subject even to Mr. L., and said (folio 567), "No third party ever yet interfered between man and wife with advantage, and he would allow no man to interfere with him." At folio 576 Mr. Lawson says, "Mrs. Forrest, in reference to my efforts to bring about a reconciliation, always said I was working in the dark, and knew not what I was doing."

We insist that this proof shows that Mr. Lawson never occupied such a relation toward Mr. Forrest as would invest him with authority to write letters to Mr. Forrest, which could be read in evidence against Mr. Forrest. There is no evidence of any authority in Mr. Lawson to do so.

SEVENTH. The exceptions to be considered under this Point relate to the "Consuelo" letter. It was offered in evidence (at folio 742), and excluded under exception—not as irrelevant, for it was afterwards read, but because the plaintiff had not been sufficiently connected with it by the proof. It had been shown by Mr. Blake (fol. 123) that it was in Jamison's hand-writing, and he had seen it in the hands of Mr. Forrest two years before the trial; by Mr. Green (fol. 517), whose testimony was not objected to, that Jamison told him he had never written to Mrs. Forrest *but once*, when they were traveling together "up the river" (Mississippi or Ohio, 522), when she requested him to write some verses for her; by Mrs. Underwood (fol. 183), that Mrs. Forrest said Mr. Forrest had searched her drawer and taken certain letters of her sister Margaret, amongst which was a "foolish" letter from Jamison, which she did not "want Forrest to see;" that on the following Monday Mrs. Forrest told the witness Mr. Forrest "had seen Jamison's letter, and he had determined on a separa-

tion," and in the correspondence which passed between Mr. and Mrs. Forrest at the time of the separation, which are set forth in the statements preceding these Points, that letter was referred to by both parties as having been found by him in her bureau drawer, and she there, as everywhere, when speaking of it, calls it a "foolish" letter. On this proof the Court should have permitted the letter to be read. As it did not, the defendant, after excepting (folio 743), produced *an affidavit made by defendant on the 15th of November, 1850, in the Supreme Court, on which, and upon an affidavit of James Lawson, he founded a motion to dissolve the injunction in the suit of Mrs. Forrest against Mr. Forrest, then pending* (see affidavit of defendant, folio 744 to 869). He also produced *the affidavit of Mrs. Forrest, read on the hearing of said motion, in answer to defendant's said affidavit* (folio 869 to 1011). The defendant's counsel then proposed to read certain *statements in defendant's affidavit as to the "Consuelo" letter*. To this the plaintiff's counsel objected, and the Court held that no part of the affidavit could be read "*unless the defendant should first elect to read the said affidavit of the plaintiff, and it should appear therefrom that the reading of some parts of the defendant's affidavit was necessary to explain and render intelligible some parts of the affidavit of the plaintiff so read in evidence.*" Exception was taken to this decision.

The defendant's counsel *then read from plaintiff's affidavit passages specified at folio*

1013 of the case. The *first* at folio 879 ; the *second* at folios 882, 883, 884 ; the *third* at folios 887, 888, 889 ; the *fourth* at folio 905 ; and the *fifth* at folio 908. These passages related to the existence of the "Consuelo" letter, its discovery by Mr. Forrest, &c.

The defendant's counsel claimed the right to read from defendant's said affidavit what defendant said about the discovery of the letter. This was objected to ; excluded, and exception taken.

Then plaintiff's counsel was permitted to read certain other portions of plaintiff's affidavit, unless defendant would consent to strike out what had been already read. The Judge so decided, and exception was taken.

Then defendant's counsel claimed, that if he did not consent to striking out what had been read as aforesaid, this should not warrant the plaintiff's counsel in reading anything from plaintiff's affidavit, except what might "further explain or qualify some of the portions already read, nor any of those parts of said affidavit of said plaintiff which were irrelevant." But the Court overruled the defendant, and held, that "unless what had been read were stricken out, the plaintiff's counsel might read from the plaintiff's affidavit such parts as such counsel might require to be read" (folios 1015, 1016). Defendant excepted.

Then plaintiff's counsel selected certain portions of plaintiff's affidavit, specified at folios 1017, 1018, and required defendant's counsel to read them to the jury, which require-

ment the Court sustained ; the defendant selected and then under the requirement read such portions of said affidavit as were so selected.

To all this and each and every part of it, defendant excepted.

Then plaintiff's counsel *claimed, and was awarded, the right* (folio 1019) *to read another affidavit of the plaintiff, made Sept. 2d, 1850, because it was referred to, and reaffirmed in her said affidavit of December 20th, 1850. To this also defendant excepted, but such affidavit was read.*

Upon a *similar requirement*, the defendant read the extract at folio 1090 from the complaint of Mrs. Forrest in the Supreme Court suit. To this defendant excepted.

Then *defendant's counsel* again claimed the right to read *defendant's affidavit aforesaid*, or certain portions specified at folios 1901, 1902. The Court *refused to permit the whole affidavit to be read, and defendant excepted—and also held that defendant's counsel was “only entitled to read such parts of his said affidavit as were necessary to render the statements made by the plaintiff in her said affidavit of the 20th December INTELLIGIBLE, and where the same COULD NOT BE UNDERSTOOD without such reference that the parts offered to be read contained allegations not necessary in order to understand fully the allegations in the plaintiff's affidavit, and sustained the objection of plaintiff's counsel. To this defendant excepted.*

The argument of the Superior Court, in support of the various rulings mentioned

above under this Point, extends from folio 3545 of the case to 3614, including an offer made by plaintiff's counsel before the trial was finished, and which is set out at folio 3558.

This argument seems to proceed on five grounds:

FIRST. That the defendant had no right to read any part of his own affidavit (folio 3561), even though it were answered in the action in which it was made.

SECOND. That though the defendant read portions of the plaintiff's affidavit, yet he could not read any other portions of the same affidavit containing statements in his favor, unless they were necessary to "explain the full and exact meaning of the passages read by the defendant, or to obviate or fully answer the effect that might be produced, or the inferences that might be drawn from such passages, although material and relevant to the issues to be tried" (folio 3553).

THIRD. That inasmuch as the defendant had read a part of the plaintiff's affidavit, she had a right to read all the rest, or such portions of it as she might select (fol. 3603).

FOURTH. That it was proper to reject what defendant

offered to read from his affidavit, because it consisted merely of denials of the plaintiff's statements; and

FIFTH. That the offer of plaintiff's counsel covered all passages proper to be read merely for explanation.

Here let us observe :

1. That the peculiar rulings at the trial *arose from the first error* of the Court in not permitting the "Consuelo" letter to be read, although abundant proof had been given to warrant its reading. And, *under the circumstances*, the defendant should have the right to a review of that decision, although the letter was afterwards read on proof to his own detriment, given under the coercion of the Judge's error.

Loveden *vs.* Loveden, 2 Hag. Con. R., 2.

Burgess *vs.* Burgess, *Ib.* 234-5.

Grant *vs.* Grant, 2 Curtiss, 64.

Hamerton *vs.* Hamerton, 2 Hag. C. R., 8.

Tucker *vs.* Tucker, 11 Jurist, 893.

Page on Divorce, 112, 113.

2. If the reading of defendant's affidavit were *conditional*, and rested upon the necessity of plaintiff's, which was an answer to it, being also read, it was obviously proper *that the defendant's should be read first*. If the defendant's affidavit could not be read, even although he first read that of the plaintiff then the Court should *not have compelled him*

to read her affidavit, as if that reading would entitle him to read his own, when, afterwards, his own was to be ruled out.

3. The defendant was entitled to read his affidavit, *as a communication made to the plaintiff, which she answered.*
4. The defendant read her affidavit, on the decision of the Judge, to the effect, that *this would give him the right to read his own.* To refuse him permission to do so was an error.

2d Starkie's Evidence, 21.

Moore *vs.* Bogert, 4 Denio, 108; S. C., 1 Comstock, 377.

Jones *vs.* Morrell, 1 Car. & Kir., 269.

5. The defendant was not legally bound to read any portions of the plaintiff's affidavit which did not relate to the matters concerning which he had given evidence.

Garey *vs.* Nicholson, 24 Wend., 530.

Kelsey *vs.* Bush, 2 Hill. 440 and note (a).

Roe *vs.* Ferrar, 2 Bos. & Pul., 548.

Haile *vs.* Hall. 13 Miss., 512.

6. The defendant had a right either to read both the affidavits, or, having, by order of the Court, read part of hers, to read the passages in defendant's affidavit relating to what hers contained; and he was not limited to such statements as were necessary to explain, but might use such as referred to

her averments, even if they fully disproved them.

The Court will observe, in this connection with this subject, that at folio 1175 the Court, under defendant's exception, excluded proof offered by the witness *Meighan*, to contradict the statement of *Mrs. Forrest* in her affidavit aforesaid of December 20th, 1850, that "*she was not in the habit of giving expensive entertainments, or receiving gentlemen at unseasonable hours.*" Defendant was thus prevented from contradicting an affidavit which he had been compelled to read.

EIGHTH. The Court erred (folios 1144, 1157) in excluding the letters of *Margaret* to *Mrs. Forrest*, her sister, proved to have been found in *Mrs. Forrest's* drawer with the "*Consuelo*" letter amongst them.

This was offered with a view to show the *general habits and conduct of the plaintiff in her household, and the nature of the correspondence she received and retained, and the nature of the proceedings which took place in Mr. Forrest's house when he was absent, and it was entirely under her control.*

NINTH. The Court below committed *two* errors in reference to the testimony of *Dr. Charles A. Lee* who was permitted to contradict *Anna Flowers* as to what she said *was her age*, when she was

committed to the House of Refuge on a charge of stealing a watch—and although Anna had only resided in his family ten days (fol. 1194), and he said “ *I did not know anything against her character or I would not have employed her,*” the Court permitted him to be asked: “ *From the degree and EXTENT TO WHICH YOU FOUND HER CHARACTER BAD, WOULD you believe her under oath ?*” To which he answered: “ *No, unless her character has materially changed; I have not seen her since then.*” This related to her character in 1838, when in 1838 she alleged herself to be thirteen or fourteen years of age.

1. What her age was when she went to the House of Refuge was wholly collateral, and her answer as to that was conclusive against the plaintiff. The Superior Court seek to justify the proof, as bearing upon the question whether her “ observation and memory, at the age stated to Dr. Lee, could be relied on ” (fol. 3631).
2. The question about her character was clearly improper, as the Doctor had proved that he knew nothing about her general character. *He does not testify, as the Superior Court say (fol. 3635), that “ he informed himself of and knew what her general character was.” He says nothing of the kind.*

We understand the law to be well settled, that the general impeachment of a witness

can only be by those who are acquainted with his general character, know it to be bad, and, from such knowledge, state that they would not believe him under oath.

Greenleaf on Evidence, 1st vol., §§ 449, 458, 461.

Howard vs. City Fire Ins. Co., 4 Denio, 502.

Gilbert vs. Sheldon, 13 Barb. S. C. R., 623.

TENTH. The next exception relates to the testimony of *Dr. John Hawkes*, and is stated at folio 1248. Proof had been given by plaintiff tending to show that Mr. Forrest had been intimate with an actress named *Josephine Clifton*, and that they were at one time together in the saloon of a car on the road to Rochester, under circumstances which were claimed by plaintiff to indicate that Miss Clifton was pregnant, and that Mr. Forrest and she were trying to produce an abortion on her person. The Doctor's wife was also examined on the same point (folio 1240).

The Doctor was asked *as an expert* (folio 1247), from what he heard and saw at the time in question, and what Miss Clifton was said to have stated to the Doctor's wife, and what the Doctor heard from his wife, whether he had formed an opinion as to what was the matter with Miss Clifton, and he was permitted to answer that he "*thought an abortion had taken place.*"

1. The Doctor was not brought within

the rule applicable to the testimony of experts or professional men, and his testimony was improperly received. The foundation for the inquiry put to him had not been laid, and he was allowed to testify on a state of facts made up in part of hearsay derived from his wife.

Greenleaf's Ev., 1st vol., § 440.

Culver vs. Haslam, 7 Barb. S. C. R., 314.

Westlake vs. St. Law. M'g. Co., 12 *ib.*, 212.

ELEVENTH. The Court improperly overruled the question put to *Captain Granby Calcraft*, tending to show that he was in the habit of having carnal intercourse with a Mrs. Robinson, and "the lewd habits of the witness in his associations with other women (than Mrs. Forrest), at the very time when the illicit commerce is charged to have taken place between the plaintiff and the witness." (*ib.* 1355.)

No objection was made to the question on the ground that the answer *might degrade* the witness, nor did he claim any privilege—the question was disallowed *solely as irrelevant*.

Proof had been given, tending to show that the Captain was very intimate with Mrs. Forrest and in her house, and the question was designed to elicit evidence that he was a lecherous man, addicted to amours, and making the acquaintance of women to gratify his sensual desires.

The Superior Court say (folio 3657) :
" That specific acts of immorality on the part of a witness, not connected with the matters in issue, cannot be received in evidence, to impair his credibility, is too well settled to be open to discussion."

1. We do not understand that the Court recognized or applied any such rule in regard to Anna Flowers.

2. It was a question whether or not the visits of Captain Calcraft to Mrs Forrest, and certain conceded familiarities between them were or were not innocent, and on his cross-examination, we suppose, it was proper to show that he was the kind of man who, being permitted any license in the society of a woman, would seek indulgence. This might qualify or give character to his relations with Mrs. Forrest or her household.

TWELFTH. An error was committed during the examination of *Catharine Levins*, a witness for the plaintiff (folio 1368). She was called to prove that she caught *Anna Flowers* in bed with *Barney McCabe* (folio 1375). On cross-examination the witness was interrogated as to having told Mrs. Forrest about this, and on re-direct examination was permitted, under exception, to state what she said to Mrs.

Forrest on the occasion, and what Mrs. Forrest said in reply, thus confirming her statement of the main fact, by saying what she had told about it before testifying. This is claimed to be erroneous.

Buller's N. P., 294.
Greenleaf's Ev., § 469.

THIRTEENTH. The alleged copy of the alleged letter of *John W. Forney* to *Mr. Roberts* was improperly received in evidence, the original *not* being shown to have been *lost, destroyed, or missing, but, on the contrary, to be in the possession or under the control of the person to whom it was addressed, and who, being examined as a witness for the plaintiff, expressed an unwillingness to produce it, because it was a private letter.*

FOURTEENTH. The Court erred in excluding the letter of *William C. Bryant* to *Charles O'Connor, Esq.*, dated February 9, 1850 (folio 1231), in which he states that Mrs. Forrest "consents to make no opposition to the application for a divorce, but desires that the arrangement for her allowance should be placed on a secure footing."

It was offered, excluded, and exception

taken, at folio 1232, and again at folio 1715.

The exclusion was justified at the trial and by the Superior Court at General Term, on the ground that Mr. Forrest had no authority to speak or act for Mrs. Forrest.

The defendant was seeking to prove that Mrs. Forrest consented to a divorce because she had been criminal. In Mr. Forrest's petition for divorce, made to the Legislature of Pennsylvania, after terms of separation had been agreed upon between him and Mrs. Forrest, providing amongst other things that he might obtain a divorce, he stated that "his wife has committed criminal acts inconsistent with the dignity and purity of the marriage state."

The petition was drafted by Mr. Sedgwick, who was examined by plaintiff, being called to prove, amongst other things, that the word "criminal" was inserted subsequently to the letter of Mr. Bryant. See Mr. Sedgwick's testimony, fol. 1217. He proved a correspondence between Mr. O'Connor and himself (folios 1217 to 1226), but states that he does not recollect sending Mr. O'Connor a copy of the petition to the Legislature without the word "criminal" in it, adding, "My impression is otherwise."

The plaintiff's counsel read a letter, dated Feb'y 6th, 1850, from Mr. Sedgwick to Mr. O'Connor, in which the former says, "*Mr. Bryant has made an appointment with Mrs. Forrest to be at my office to-day, at three*

o'clock. I have this moment been apprised of it, and *am desired by Mr. B. and Mrs. F.* to require you to meet us at that time and place."

Mr. Sedgwick proved, on cross-examination (folio 1231), that when it was considered that the ground assumed by Mr. O'Connor was incompatible with a divorce, "Mr. Bryant became introduced," who was "a particular friend of Mr. and Mrs. Forrest." Mr. Sedgwick addressed a note to Mr. Bryant, Feb'y 9th, 1850 (fol. 1231), which defendant offered to read, but it was excluded, and defendant excepted.

Mr. Bryant was examined, and, as we understand his testimony (folio 1701), showed relations between him and Mrs. Forrest, far more authoritative, as those which led the Superior Court to justify introducing the letters of *Mr. Lawson*. He spoke to Mrs. Forrest, at Mr. Sedgwick's suggestion, about a divorce; she said she was willing to consent to a divorce. He communicated that statement in the letter of Feb'y 9th, which the Court would not receive.

We submit that on this state of facts there was proof which warranted reading Mr. Bryant's letter.

FIFTEENTH. The argument of this bill of exceptions proceeded as if it were a pure bill of excep-

tions, taken on a trial in an action at law, and the Superior Court so treated it in their opinion at General Term. But in the opinion of the same Court, given by Judge Woodruff on the final hearing, he suggests that the effect of "mere errors" now, in a case of this kind, is the same as on the trial of a feigned issue in the Court of Chancery, and it is "*not apparent* that the Code has introduced a *new rule* on the subject."

1. In determining the question of jurisdiction, the Court held that this was an *action* under the Code.
2. If so, it would seem that proceedings in it should conform to the provisions applicable to all actions, unless some exception be made.
3. None is made as to exceptions on trials of issues in divorce cases, as distinguished from any other
4. But even if the rule be the same as in the late Court of Chancery, and the application for a new trial is to the discretion of the Special or General Term, as it is supposed to have been to that of the Chancellor, then,
 - A. We do not suppose that the discretion here referred to is an arbitrary one.

B. We insist, that the errors committed in this case are such as plainly led to injurious and unjust effects, of which the appellant has a right to complain, and which should be reviewed.

SIXTEENTH. All the proceedings of the Superior Court, in reference to permanent alimony, after the reversal of the judgment on the finding of the jury as to that subject, have been founded on erroneous principles, and the judgment in this action should, on that account, be reversed.

First. The reference was ordered by the General Term, which had no jurisdiction or power to make an order of reference.

1. The power to refer an issue or a question of fact resides exclusively in the Special Term.
2. If the judgment at Special Term were erroneous, the General Term should have remitted the action to the Special Term for a new trial or hearing. The effect of reversing the judgment as to alimony was to declare that it was founded on incompetent testimony, or made without any legal proof or basis. If that were so, the Special Term was the proper forum to re-examine the case and correct the error. (*See Code, sec .330.*)

For the views of the Superior Court on this subject, see folios 3856 to 3864.

Second. The Referee, following the adjudication of the Superior Court, improperly refused to receive evidence that, after the interlocutory judgment for divorce, Mrs. Forrest was and continued to be intemperate, extravagant, unchaste, and habitually addicted to profligate and vulgar associations.

The Referee erred in excluding the testimony of *McMahon*, and also that of *Gihon*, in relation to the plaintiff's conduct, habits, and standing, after the interlocutory judgment for divorce.

McMahon was porter at the City Hotel, in Providence, R. I., from 1847, for a period of five years and upward. In 1853, the plaintiff and *George Vandenhoff*, the actor, were fulfilling a theatrical engagement at Providence, and boarded in that hotel. The witness was asked by defendant's counsel as to Mr. V. and plaintiff:

Q. "*How long did they continue on board at that hotel?*" This was objected to and overruled, and the defendant excepted.

The witness was then asked:

Q. "*What apartment did Mrs. F. occupy in the hotel at that time?*"

This was also objected to ; and *plaintiff's counsel called on defendant's counsel to state what was proposed to be proved by the witness.*

Defendant's counsel then stated that this was one of a series of questions which he proposed putting, to show, *by the witness, sexual intercourse between the parties above named (the plaintiff and Vandenhoff), in the apartment occupied by her at said City Hotel in 1853.*

The plaintiff's counsel objected to the proposed proof, on the ground that *no such matter was in issue in the reference.* The Referee overruled the question, and excluded the proposed testimony. The defendant excepted. (Case, *folios* 3052, 3053.)

Mr. Gihon was in San Francisco (California) in the years 1849, 1850, 1851, 1852, 1853 and 1854.

He was asked in regard to the plaintiff, while residing in California, "Did you ascertain what were her habits as to *extravagance or economy*?"

This was objected to by plaintiff's counsel as wholly irrelevant, *so far as the object was to show that her expenditures were wasteful*, or beyond necessity, but if the object were to show economy, or any thing tending to prove an acquisition or accumulation of property, it was not objected to.

Defendant's counsel stated that he proposed by this question to elicit proof tending to show that the plaintiff was *habitually extravagant in expending money for her personal purposes.*

The Referee sustained the objection, and defendant excepted. (*Report, fol. 310.*)

Mr. Gilson was then asked :

“ Are you acquainted with Mrs. Forrest's *general character as to chastity*, during the period you resided in California ?”

This was objected to by the plaintiff's counsel. The Referee sustained the objection, and the defendant excepted.

The witness was then asked :

“ *What class of persons visited and were the intimate associates of Mrs. Forrest in California, while you resided there ?*” (*Fol. 312.*)

This was objected to by plaintiff's counsel as irrelevant.

The counsel for the defendant stated that the two last preceding questions were put with a view to elicit proof, showing that *Mrs. Forrest, while residing in California, was HABITUALLY UNCHASTE, and CONSTANTLY RECEIVED, as her MOST INTIMATE COMPANIONS, visitors, and friends, the PROFLIGATE MEN of San Francisco,*

WHOSE NAMES AND OCCUPATION THE DEFENDANT'S COUNSEL PROPOSED IN THAT CONNECTION TO SHOW.

The Referee sustained the objection, and overruled the testimony. The defendant excepted (*fol.* 3074).

The testimony of each of said witnesses was legally competent, and should have been received as offered.

A. The defendant proposed to prove, as already shown, that the plaintiff had sexual intercourse with men after the decree for divorce.

B. It is well settled, that the misconduct of the plaintiff, prior to the judgment of divorce, may be looked into by the Court in determining the amount of alimony. Although given in evidence to bar the claim for divorce, and held not sufficient for that purpose, it may yet be, and is afterward, received by the Court, and examined in deciding on the question of alimony.

Wilmore vs. Wilmore, 15 B. Monroe, 49.

Peckford vs. Peckford, 1 Page, 274.

2 Hagg. Ecc. Rep., 202.

Batley vs. Batley, 1 Rep., 212.

Griffin vs. Griffin, 8 B. Monroe, 120.

1 Black. Com., 442.

Lee vs. Lee, Dickens, 321.

Bartlett vs. Bartlett, 1 Clark, 460 ; 6 Har. & J., 485.

C. The reversal of the judgment for alimony founded on the verdict and the order for reference placed the plaintiff in the same condition as to alimony as if the jury had the right to regulate the allowance, and whatever testimony would have been proper at the trial on that point was also proper at any time when, before a new tribunal, the same question was presented for decision.

D. The tribunal which is to determine the main issue may not be convinced of the wife's guilt, in reference to adultery charged, and yet what is proved to inculpate her may show a kind or degree of misconduct proper to be considered in settling the amount to which she is entitled out of her husband's estates.

E. If the Court can, in any stage of a controversy between husband and wife, receive evidence of her adultery or misconduct to affect the claim or allowance for alimony, it is difficult to perceive why the same proof may not be, and should not on the same issue and for the same purpose be, received at any other stage of the cause, when the Court are called upon to determine the same question.

Govier vs. Hancock, 6 T. R., 603.

Etherington vs. Parrot, 1 Salk., 118.

F. The defendant offered to prove that the plaintiff was extravagant in spending money for her personal purposes. The Referee excluded this. He was clearly in error, unless the amount to be awarded plaintiff was to be fixed without reference to her reasonable wants and requirements. For if it were shown that she used money *not for proper but for useless purposes, the more an allowance to her was stinted consistently with insuring her a proper support the more would her habits be improved, and the more correctly would the bounty, or just award of a Court, be administered.*

See 1 Salkeld, 118 (*ut supra*); 2 Haggard Ecc. Rep., 202.

G. The defendant offered to prove that the plaintiff had selected and preferred vulgar associations, such as would exclude her from the society of either ladies or gentlemen of the rank or condition in which she moved when residing with defendant.

This bore upon the question as to *what was her station in life*, a point uniformly regarded in England, and here, in fixing the amount of alimony.

In excluding this, the Referee clearly erred, *unless the choice of the wife after divorce, as to a position in society, is wholly imma-*

terial in determining how much she should have from her husband's estate.

Bishop on Mar. and Div., § 612,

- H. The defendant offered to prove that for years, while residing in California, after the interlocutory judgment for divorce plaintiff was *habitually unchaste*.

If this were the fact about her, it is probable, if not certain, that it would be known, and would affect her standing.

Such a course of life would lead her to such practices, expenditures, and luxuries as no court of equity should encourage, especially out of the husband's estate, and under an authority to make a "suitable" allowance "for her support," such as the Court should deem "just," having regard to her circumstances, as well as to those of the husband.

If, in measuring the allowance to a woman, in a case of divorce, the Court are to regard either her actual position in society, or the position she plainly manifests a desire and an intention to occupy, then it would seem to be very clear that how she lives, what are her habits, what class of associates she selects, and moral developments she exhibits, are all proper subjects of proof and consideration, *unless the virtuous, pious, and prudent*

woman and the lecherous, profane, and reckless outcast are, in the eye of the law and the Courts, to be regarded as equal on a divorce granted in reference to what is to be allowed, to either out of the estate of a husband, from whom she may happen to have obtained such divorce.

I. It is very noticeable in this connection that the Referee allowed the plaintiff to prove, and in his report lays stress on, what were not only her station and mode of life before her marriage, *but those of her mother*, although this evidence was objected to (*Report, fols. 2903 to 2908*); yet he *wholly excludes any testimony as to the life she led or rank she chose, after she had separated from her husband*. He thus makes an allowance for her present support wholly irrespective of her present station, but governed mainly by her condition at the time of her marriage to the defendant in 1837.

J. The views thus presented in this connection derive increased force from the fact, if it be one, that the plaintiff is in this case, as regards support, a "ward of Chancery." It is idle to say that the misconduct of a woman, for whose support this Court makes provision, affects the husband alone, when the truth is plain and notorious that *it is a matter of public scandal and reproach, and may even affect the tribunal which provides facilities for its commission*.

It will be observed that the criticisms of the Superior Court, on the *generality* of the testimony proposed to be taken, under the Commission, are distinctly overcome in the offers of proof before the Referee, where, as to the vicious practices of the plaintiff, it was proposed to define *time, place, and person*.

Third. The Referee decided, and the Superior Court has not questioned the conclusion, that the statute for divorce, under which the decree in this action was obtained, saves for the plaintiff what he deems and denominates the *common law right* to support out of her husband's estate.

A. The only mode in which that common law right was presented, was when the husband was sued at law for debts which the wife contracted, his obligation being restricted to what is called "necessaries." And in all such cases, whatever other features may have been presented on the trial, the Courts *invariably received proof*, if any could be adduced, as to the *misconduct, adultery, extravagance, wastefulness, misappropriation, rank in life, private resources, and habits of the woman, as a defense to the action, even in cases where the innocent party who gave credit to the wife, had no notice of the delinquency which as between her and her husband, deprived her of the*

power and right to charge the latter even for what was necessary for her sustenance.

Manby *vs.* Scott, 1 Siderfin, 109.
 1 Bacon's Ab., p. 296.
 Aguilar *vs.* Aguilar, 5 Mad., 414.
 Liddlow *vs.* Wilmot, 2 Stark, 77.
 Etherington *vs.* Parrot, 1 Salk., 118.

Even where the husband brought a mistress into his house, and violently drove his lawful wife out of it, *her adultery afterward*, and while living apart from him, was held to free him for all liability to her debts, even if incurred for absolute necessities.

Govier *vs.* Handcock, 6 T. R., 603.

SEVENTEENTH. The Superior Court errs, in holding, that the amount of permanent alimony is to be awarded in the exercise of mere discretion, and that, upon whatever principles, or by whatever standard it may be measured out, the amount of the allowance, or the mode of computing it, or fixing it, cannot be reviewed.

First. The authority to make any such award is wholly derived from the statute. The allowance is to be "*suitable*" for "*her support*;" and in determining what is thus suitable, the tribunal, making the award,

is to have "regard to the circumstances of the parties respectively" (2 R. S., 146, sec. 58).

Second. Nothing, to the contrary, was decided in the case of *Burr vs. Burr*.

See remarks of Nelson, C. J.

See remarks of Senator Bockee, 7 Hill, pp. 226, 231, 233

See remarks of Lott, Senator, 7 Hill, pp. 237, 242, 243. .

See remarks of Root, Senator, 7 Hill, pp. 237, 244.

See the points made, and cases cited on these questions, with which we furnished this Court, on the motion to dismiss the appeal in this case.

EIGHTEENTH. The allowance, in this case, was made on erroneous and unjust principles, and on grounds, stated in the opinions of the Superior Court, which we respectfully submit, are incorrect and incongruous.

First. In reference to what kind of proof should be received in reference to fixing the amount of permanent alimony, the Superior Court held (as we have seen), that the rights and obligations of the parties, in this respect, are fixed absolutely when the "decree" for divorce is "pronounced." Then the right to the

allowance is "judicially ascertained and declared." And they say: "The rights of THE PARTIES are to be settled and fixed upon the facts as they exist at the time the decree of divorce is pronounced."

This must, of course, be a rule equally applicable to and effecting both parties to the action. So the Supreme Court has adjudged.

It follows, then, as a necessary conclusion, that no inquiry as to the conduct, means, or condition of either of the parties, *before* the time the decree is pronounced, can be the subject of proof or consideration. That is the point of time alone to be regarded in this respect; and, therefore,

1st. If it could be shown that, from the time of the commencement of her suit for divorce to the date of the decree, the plaintiff had kept a low brothel at the Five Points, in New York, for paramours and prostitutes of all colors and grades, selling the use of their persons and her own for years, she and her patronizing harlots, each "purchasing their morning's meal with the wages of last night's sin," nothing of all this can be proved or regarded in determining how much shall be paid to her yearly, out of the pockets of a husband, who, by the testimony of policemen, pimps, or keepers of assignation houses, happened to be found guilty of adultery.

B. Of course, too, his pecuniary condition, at the time of the decree, is alone to be regarded, unless, indeed, the measure of allowance, beginning with the state of his circumstances, is to fluctuate with all the mutations of his fortune from that moment until the entry of the final judgment.

C. The Superior Court has wholly departed from its own rule, by permitting proof as to the defendant's pecuniary condition from the commencement of the action, and before that time, down to the date of the decree, and of his earnings and the increase of his estate after such date, until the amount of the allowance was permanently settled. So that, while as to the wife, her character, habits, or resources, nothing is to be shown from the time the decree is pronounced, every change in the circumstances of the husband, though after the same date, may be taken into account in settling what she is to receive.

Second. The Referee and the Court founded the allowance upon the idea that in some sense the wife, equally with the husband, contributes to the creation of his estate. If this be correct, then there should be but one rule in these cases, viz. : a partition—each should take half. But there is no reason or warrant for the idea itself.

Third. Notwithstanding the rule of the Superior Court, as to the effect upon the parties of pronouncing the decree, we discover that the allowance to the plaintiff is enhanced in reference to what she might have reasonably expected, founded upon the defendant having designed to occupy as a residence the fine structure he was erecting near Yonkers, and which was generally called "Fonthill."

NINETEENTH. The Court has erroneously allowed alimony at the rate of four thousand dollars per year, from the commencement of the suit.

First. If the right and the allowance are to be adjusted in reference to the state of things when the decree is pronounced, it is difficult to perceive how that rate is to be carried back over all the years intervening between that time and the date when the suit was brought. And we see from the proofs in this case, and the Referee's report, that the circumstances of defendant varied considerably during that period.

Second. But it is not legal or just to begin the allowance of *permanent* alimony at the commencement of the suit. The statute contemplates no such rule, and it is

inconsistent with settled principles of the law. When the wife brings her action, she may, at any time, apply for temporary alimony, and allowance for counsel fees, &c. This enables the Court to compel the support of a wife by the husband while the marital relation continues. She may think proper not to make such an application, and rely on her own resources, as Mrs. Forrest did in this case; for, although her suit was commenced in 1850, she did not apply for alimony until July, 1859.

The power to award *temporary* alimony expires with the judgment. Then, for the first time, the power of the Court to make any decree or order for permanent alimony begins to operate.

Yet, in this case, over *thirty-five thousand dollars* is allowed to the plaintiff, notwithstanding her failure to seek for temporary alimony, and a delay of three years in prosecuting the reference before Mr. Bradley, for which delay Judge Woodruff seems, in his opinion, to think Mr. Forrest is in some way responsible, although we can discover no fact in the case warranting any such imputation.

TWENTIETH. In measuring the allowance to the plaintiff, the Referee and Court disregarded all

the proof as to what it would actually cost the plaintiff to maintain herself in a suitable manner. This is erroneous, because the allowance is to be suitable for her support.

TWENTY-FIRST. The amount allowed is neither reasonable nor just.

First. When she separated from the defendant she accepted, for her maintenance, an annuity of *fifteen hundred dollars*.

A. She writes to Mr. Lawson, 20th December, 1848 (folio 706), "Now, you know enough of the expenses of house-keeping in New York, to know that out of two thousand dollars, after paying house rent, there could not be much to give away." She refers to Mr. Lawson's statement, that Mr. Forrest and his sister lived on "a much smaller sum," and says, "I know they did; but you must take several matters into consideration about that; first, that everything is more expensive in New York than in Philadelphia; and, *secondly*, that they have, during a long term of years, been accustomed to practice habits of more strict economy than I ever knew anything about; but

which, at the same time, I, by no means, despise, and shall strive, in some manner, to emulate, but I cannot hope to do so at first."

She states other reasons why the Forrest family lived so economically, and says, "I never could tax myself with extravagance;" says the expenses of her house, with strict economy, amount to \$2,000 per year, the rent \$500, and all the items amount to \$1,900, "and surely \$100 dollars may be allowed for incidental matters."

She says, also : " You were one of the first to propose the sum to which you say Mr. Forrest objects (2,000), but I think he will not consider it unreasonable when he remembers that, besides rent, I must make a considerable deduction from each quarter's payment, to get the place furnished by degrees," &c. (folio 711.)

B. In her affidavit, in answer to the defendant's petition for a commission, she says (fol. 1906), " she cannot deny having spent and given away money to an extent which prudence forbade, and, so far, she is perhaps liable in a degree to the charge of extravagance."

C. Down to the year 1859 she appears to have maintained herself and one or more of her

sisters, living in good style without receiving or seeking from the defendant any aid except the \$1,500 a year before mentioned.

D. She was proved before the Referee to have been manager of the leading theatre in San Francisco for some time, besides being an actress.

E. She is a woman in middle life, of such a position as belongs to a divorced wife, being by profession an actress, but not practicing as such for some time past and there is no proof from her as to what her rank or condition in society is or has been for some time past. We offered to show what it was in San Francisco for some years, but, on the objection of her counsel, the proof was excluded.

F. On the subject of what it would cost her to live, we proved as follows :

By *Mr. Conway*, a prominent actor and respectable gentleman, who was keeping house, No. 30 East Twenty-fourth street, New York, an eligible neighborhood, that he maintained there, in a three-story and basement house, himself, his wife, wife's mother, two children, a niece, and a nephew, on an average expense of \$40 per week, paying an annual rent of \$650, *He was not cross-examined (folio 3055, &c.).*

By *Mr. Phalon*, a respectable citizen of New York, who had kept house in that city for twenty-three years, that the weekly expenses of maintaining himself, his wife, a son, and two servants (his son clothing himself), was \$35, residing in his own house, for which he had been offered \$1,000 per year rent, and a good house could be obtained for \$700 per year.

By *Mr. Leland*, one of the proprietors of the Metropolitan Hotel, that in a first-class hotel in New York, for \$17.50 per week, a lady may obtain a spacious and well-appointed apartment, with board, lights, fuel, attendance, and the comforts of the house (*folio* 2996).

By *Wm. Henry Weller*, also a respectable citizen, that *Mrs. Forrest* occupied rooms at his house, 713 Broadway, on two occasions, once for about six weeks, the second time for a longer period; she had residing with her a sister, aged about 25 years, and a gentleman named *Mr. Sedley*, who had a separate room (3084); her meals were served in the parlor by a waiter in *Mr. Weller's* employment; the charge for her apartments, meals, attendance, and whatever else he provided for her and her sister was, for the three rooms first used, \$15 per week; for the three rooms afterwards, \$17 per week; for meals sent to the rooms 50 cents a day, and charge for food by the card according to the articles sent.

G. No proof was given to contradict either of the witnesses above mentioned, nor to show that their estimates were incorrect, nor to prove how much it would cost the plaintiff to support herself in a suitable manner, nor what it had actually cost her to do so at any time, nor what her means or resources had been at any time, or were during the progress of the reference.

Yet, to our evidence in this respect, neither the Referee nor Court seems to have paid any regard whatever.

Second. In the light of all these facts, the plaintiff is allowed four thousand dollars a year, from the time of the commencement of this suit, a yearly sum much greater than the salary paid to many of the eminent gentlemen who occupy places of public distinction and importance in our State.

Third. The amount awarded the plaintiff has strangely varied, according to the estimate of different parties. When she separated from the defendant, she asked for *two thousand* dollars a year, but ultimately agreed to accept *fifteen hundred*; the jury gave her *three thousand*; the Superior Court gave her at first *two hundred dollars per month* (\$2,400 per year) for temporary alimony; then raised it to \$3,000; the Referee made it \$4,000, and the Court approve that finding.

Fourth. In a preceding portion of these Points we have shown upon what erroneous principles and estimates the Referee proceeded, including a failure to regard in his estimate any bounty he conferred on his sister, except to take it from them and add it to his estate, to increase the plaintiff's allowance.

TWENTY-SECOND. Throughout this case, the idea seems to have pervaded the minds of Judge, jury, Referee, and Court, that there was some reason why the defendant should be treated with great severity, and mulcted in cost and charge to the utmost extent practicable.

That a jury found against him, on an issue, as to adultery, is true. It is equally true that they found, on the same issue, in favor of the plaintiff, although there was a great deal of evidence against her, on which she might well have been convicted.

The finding of the jury may be conclusive in the procedure of an action, but does not always develop the real truth and justice of a controversy, especially when the contest is between a woman and a man.

There is no warrant for the allegation that, during the whole married life of the parties, Mr. Forrest

ever even spoke an unkind word to his wife; and her letters and appeals, up to the moment when he declined even to correspond with her any longer, are full of the strongest testimony in his favor, as a gentle, loving, attentive, and liberal husband.

While witnesses, called against her, were disbelieved, on very slight criticism or impeachments, his guilt was declared, on very light, and sometimes most unreliable testimony.

He claims that well-settled rules of evidence were departed from in the admission and rejection of evidence, by which his rights were impaired, and the opportunity to secure justice taken away.

And he submits to this Tribunal of last resort that, after a calm and intelligent review of the case presented on this record, he may reasonably hope that the judgment or judgments against him will be reversed, and some disposition made of this case, which will prevent his being despoiled at once of reputation and property, without having enjoyed the means, which he thinks the law has provided, for the protection of both.

TWENTY-THIRD. The preceding Points cover, of course,
the appeals as to the commission,
&c.

TWENTY-FOURTH. The judgment should be reversed
a new trial of the issues awarded,
and all the proceedings as to per-
manent alimony vacated, with the
opinion and direction of this Court,
as to the proof which the defendant
may give in reference to the plain-
tiff, in fixing such alimony.

H. W. ROBINSON,
Attorney for defendant.

J. T. BRADY,
JOHN VAN BUREN,
Of Counsel.

STATE OF NEW YORK,
IN THE COURT OF APPEALS.

CATHARINE N. FORREST,

Plaintiff and Respondent,

against

EDWIN FORREST,

Defendant and Appellant.

STATEMENT
and **POINTS** for
Plaintiff.

FACTS.

The defendant appeals from a judgment of divorce against him in the New-York Superior Court, on the ground of adultery, and from an order for alimony. (*fo.* 3488.)

First Head: *History of the litigation.*

The action was commenced Nov. 10, 1850. (*fo.* 3.) Mr. Forrest answered Dec. 17, 1850. (*fo.* 58.) Issues were ordered Dec. 24, 1850. (*fo.* 62.) A special jury was impanelled before the late CHIEF JUSTICE OAKLEY Dec. 15, 1851. (*fo.* 80.) And after a trial which occupied six weeks, a verdict was rendered against Mr. Forrest on all the issues, January 26, 1852. (*fo.* 67.) Judgment accordingly at Special Term, January 31, 1852. (*fo.* 67.) After the pleadings were put in, and after an issue had been ordered, the Code was amended by directing that actions for a divorce on the ground of adultery should be tried by jury. *Laws of 1851, p. 893,*

Complaint. (fo. 4 to 39.) *Answer.* (fo. 40 to 58.) *Reply.* (fo. 59.) *Order for Issues.* (fo. 62 to 67.) *Judgment of Special Term.* (fo. 67 to 80.)

The jury awarded alimony at \$3000 *per annum*, (fo. 71,) and alimony was ordered accordingly. (fo. 74.) The Special Term also ordered that, on her alimony being secured, Mrs. Forrest should release her contingent right of dower. (fo. 79.)

Mr. Forrest took exceptions ; (fo. 80 to 1810 ;) and on Feb. 16, 1852, he appealed to the General Term. (fo. 1.)

Mrs. Forrest excepted to, and appealed from the order requiring her to release her dower. (fo. 1810 to 1819.)

The General Term gave its judgment on these appeals July 24, 1856, reversing and striking out the order requiring Mrs. Forrest to release her dower. (fo. 1820 to 1823.)

The order fixing the alimony was also reversed, and a reference directed to ALVIN C. BRADLEY, Esq., to ascertain and report a suitable allowance. (fo. 1824 to 1830.)

The judgment of the Special Term for the divorce and costs was affirmed. (fo. 1830 to 1832, 1828.)

{ *Opinion per BOSWORTH and WOODRUFF, JJ.* (fo. 3496 to 3739.)

Forrest v. Forrest, 6 *Duer R.*, 102.

Forrest v. Forrest, 3 *About Pr. R.*, 144.

The defendant took a multitude of exceptions on the trial. The *case* occupies more than 1700 folios, and it contains all the evidence. The defendant did not move for a nonsuit. (fo. 147, 148.) He found no fault with the Judge's charge. (fo. 1796.) And, though he appears by the record to be a litigant of the most pertinacious kind, (fo. 1180, 1856, 1934,) he did not ask for a new trial on the merits. (fo. 3496.)

The defendant can review here only the 24 exceptions submitted to the General Term. (*fo.* 3496.) They are examined in the opinion. (*fo.* 3500 to 3711.)

When this action was commenced, Mrs. Forrest was living apart from her husband, by his command, on an allowance of \$1500 per annum. (*fo.* 1897, 1898, 203.) This had been very grudgingly conceded to her. (*fo.* 593, 595, 665 to 667, 704 to 716-1159, 1171.) And, consequently, she did not apply for counsel fees or expenses. From the time of the verdict, he discontinued this allowance, and by security on his appeal, stayed execution for the alimony. (*fo.* 3138, 1930 to 1932.) This left her to starve, beg, or earn a subsistence by her own labor. For the latter purpose she made a journey to California and thence to Australia. She went thence to England on a visit to her mother, and returned to N. Y. in December, 1858. (*fo.* 1896 to 1900.) This caused a delay in the motion for alimony until May 25, 1859. (*fo.* 1841.)

She then set in motion the proceedings to recover alimony, and Mr. Forrest, who had lain still about three years, instantly adopted measures to resist and delay them. This brings us to the second stage in the litigation.

June 1, 1859, Mr. Forrest moved at Special Term for a commission to California for the examination of 74 witnesses and as many more as he might think fit. (*fo.* 1836-1856-1864.) The alleged object was to obtain testimony reflecting upon the morals of Mrs. Forrest subsequently to the divorce and whilst she resided in that State, to be used before the referee on the question of alimony. (*fo.* 1837 to 1895.) A stay of proceedings was also asked for. (*fo.* 1864.)

On this motion there were read *first*, Mr. Forrest's bill

of exceptions containing his former effort to impeach her in the Superior Court and showing its character and result; (*fo.* 1434–353 to 367, 395–1800;) *secondly*, a printed volume of affidavits used on former motions, shewing a similar, and though unresisted, an unsuccessful *prior* effort to impeach her in his application for a divorce to the Legislature of Pennsylvania—a State in which they had never resided; (*fo.* 1950 to 2738;) *thirdly*, an affidavit of John Hall Winton, one of the witnesses whom Mr. Forrest professed a desire to examine, negating his allegations, (*fo.* 1948,) and *fourthly*, Mrs. Forrest's own and other affidavits. (*fo.* 1896 to 1947.)

The motion was denied June 25th, 1859. (*fo.* 2739.) And the order was affirmed at the General Term August 30, 1859. (*fo.* 2742.)

{ Opinion of WOODRUFF, J., at Special Term denying this motion. (*fo.* 3916.)
 { Opinion of General Term per BOSWORTH, CH. J. on affirmance. (*fo.* 3759 to 3819.)
 { Report with points, *Forrest v. Forrest*, 3 *Bosw.*, 661 to 702.
 { Report with abridged statement of the papers. *Forrest v. Forrest*, 9 *Abbott's Pr. R.*, 289.
 See mem. of proceedings. (*fo.* 3300 to 3305–2929.)

After the Special Term had thus, on June 25th, 1859, denied this motion for a commission to California, and after the General Term had refused to postpone to October the argument of defendant's appeal from that decision, the referee adjourned the proceedings before him for three months, "to enable the defendant's counsel to go to Europe." (*fo.* 3748, 3751 to 3755.) See *Forrest v. Forrest*, 3 *Bosw.*, 650. Mrs. Forrest then petitioned the Special Term to direct a reference as to the alimony to another referee. The defendant opposed this motion, consented to waive the referee's order of adjournment, and procured and produced the written "consent of the

referee to continue to act as referee," (*fo.* 2749,) and thereupon the Special Term, July 22, 1859, ordered such reference as to alimony to be proceeded in without delay. (*fo.* 2745 to 2750.) See *opinion* of WOODRUFF, J., hereon. (*fo.* 3745 to 3758.)

On this same occasion an allowance for expenses and for temporary alimony was prayed for. The former was allowed to \$1500, and the latter was allowed at \$200 per month. (*fo.* 2747-3755 to 3758.) Subsequently, on 31st December, 1859, the temporary alimony was increased to \$250 per month. (*fo.* 3441.)

There was no appeal to the General Term from either of these orders.

On Dec. 1, 1859, ALVIN C. BRADLEY, Esq., the referee, reported that \$4000 per annum was a suitable allowance. (*fo.* 2750 to 2755.)

Facts found by Referee. (*fo.* 2756 to 2773.)

REFEREE'S OPINION. (*fo.* 2774 to 2830.)

{ Referee's report of the testimony, &c. before him,
(*fo.* 2831 to 3423.)

The defendant made up a bill or *case* containing 29 exceptions taken by him before the referee. (*fo.* 3423 to 3438.)

{ See motion in reference to these exceptions. Opinion of WOODRUFF, J. *fo.* 3820—*Forrest vs. Forrest*, 5 *Bosw.* 672.

Argt. from N. Y. Herald, Dec. 21, 1859, *post p.* 36.

The plaintiff's motion for permanent alimony was brought on before MONCRIEF, J., Feb. 23, 1860. (*fo.* 3461.) And, on May 21, 1860, it was adjudged that the same be paid from the commencement of the action at \$4000 per annum. Proper credits being given for intermediate payments, the balance to that date was adjusted at \$35,593.00. (*fo.* 3444 to 3459.)

The defendant made a *case* in reference to this trial or hearing, containing many exceptions. (*fo.* 3461 to 3479.)

He appealed to the General Term June 4, 1860. (*fo.* 3480.) See opinion of MONCRIEF, J. on stay of proceedings by security on appeal. (*fo.* 3836.) And on Dec. 7, 1861, the General Term affirmed the said judgment of the Special Term. (*fo.* 3482.)

{ See opinions of General Term hereon. (*fo.* 3496 to 3914.)

On March 21, 1862, the defendant appealed to the Court of Appeals "from the final judgment of the General Term and each and every part thereof, and also from each and every judgment and order in said action, and from each and every part of them and of each of them." (*fo.* 3488.)

At the June term 1862, the plaintiff moved to dismiss this mass of appeals on the ground that an appeal from the final determination of the General Term awarding the divorce was barred by the statute of limitations and that the order for alimony was a matter resting in discretion. The motion was denied. But it is unknown whether such denial was on the merits or on the ground of prematurity.

Hecker v. Fowler, 1 *Black's U. S. R.* 95.

Second Head: *General statement as to the parties and introduction to the controversy.*

Mr. Forrest was born in Philadelphia March 9, 1806. (*fo.* 126-3047-2756.) He became a tragedian, and as such, soon acquired a high position, which has been hitherto maintained. He had acquired a moderate estate before his marriage; how much, cannot certainly be ascertained, as he swears that he never kept any accounts before his marriage, or since his separation from his wife. (*fo.* 3043, 3108.) It probably did not exceed \$12,000. (*fo.* 2819.) During the twelve years of his married life, he kept careful and exact accounts. (*fo.* 3043.) When he separated from his wife, he was worth

at least \$150,000, (*fo.* 2758,) and probably \$250,000. In 1859, when the amount of the alimony was fixed, he was worth, at least, \$260,000—probably twice that amount and perhaps more. (*fo.* 2957–3001 to 3006–3100 to 3102–3122–3131.)

Before his marriage he bought for \$6000 a house in Philadelphia, and thenceforward his mother and three sisters resided therein, and were economically supported by him. (*fo.* 2757, 593, 707, 708, 710.) His mother died in 1847. (*fo.* 271.) In 1859, when the alimony was settled, his apparent domicil was a three-story and attic house in Philadelphia, fifty feet wide, with a brown stone front. It was respectably furnished. (*fo.* 3114 to 3117.) The house and lot cost \$33,000. (*fo.* 3096.) His three ^{maiden}sisters lived in it. The youngest was at least forty years of age; two of them are his seniors. ~~They are all un-~~
~~married.~~ (*fo.* 3047 to 3050.)

In 1836, Mr. Forrest visited England. In his appearances upon the stage, during his whole stay in that country, he had great professional success. (*fo.* 2757.)

In December 1844, or January 1845, Mr. Forrest accompanied by his wife, made a second professional visit to England, from which he returned in October 1846. [*fo.* 330, 367, 588, 589, 1505.]

On this occasion Mr. Forrest was less fortunate. He was hissed whilst upon the stage, and his performances were unfavorably criticised in some of the public journals. He imputed this opposition to the friends of Mr. Macready, a distinguished English tragedian. He, himself, hissed Mr. Macready. [*fo.* 700.]

Subsequently Mr. Macready visited this country, and whilst performing in Philadelphia and New-York, was assailed by Mr. Forrest with great pertinacity and violence. [*fo.* 1723 to 1730, 1140, 1141.] See also *fo.* 786, 790 to 796. He sought to convert this personal dispute into a national feud between Englishmen and Americans.

[*f*o. 1593, 1594.] It was in full vigor during the autumn of 1848. [*f*o. 1730, 1592 to 1596, 1602, 1603, 1609, 1610, 1116, 1118, 1119, 1122, 1123, 1135, 1137.] It reached its climax in the celebrated Astor Place riot and massacre of May 10, 1849. Extreme violence, attended by bloodshed and the sudden death of many innocent persons, marked its close on that day. [*f*o. 1557, 537, 541, 542, 544, 1142, 959.] See also *f*o. 1611, 1617.

Another chapter in Mr. Forrest's life may be stated here.

On Feb. 6, 1847, [*f*o. 588, 589] Mr. Forrest purchased for \$12,000, a site on the east bank of the Hudson near New York, and proceeded to erect upon it a magnificent structure designed for a country residence. [*f*o. 667.] In January 1849 the building, which had received the name of Fonthill Castle, was mainly but not wholly completed, nor has it ever been furnished. [*f*o. 545, 589, 1550, 1551.] It was sold soon after the affirmance at General Term in 1856. [*f*o. 3155.]

In Jan. 1849, when the first dispute arose between Mr. Forrest and his wife, and he determined to put her away from him, a vast sum had been expended on this yet incomplete enterprise. [*f*o. 3123, 1606.] Perhaps the cost had not been duly reflected upon before ; but his error must have become apparent at this time. He was now 43 years of age ; he was becoming weary of professional labor, and as early as Oct. 1848 [*f*o. 1610, 1591] he contemplated retirement from it. [*f*o. 1633, 1598, 1610.] The cost of completing Fonthill was, for him, enormous ; the cost of adequately maintaining such an establishment would have been an intolerable burden. His whole estate would have been consumed in the first outlay ; and a life of professional labor, as an itinerant theatrical star, would have been necessary to provide

the requisite income. If engaged in such labors, *he* could not have enjoyed its pleasures ; and, indeed, he never exhibited to any extent a relish for associations suitable to the lord and lady of such an abode.

Margaret Sinclair.

In the autumn of 1837, Mr. Forrest established his first family homestead in Reade street, New-York. [*fo.* 149, 199.] About eighteen months afterwards, he removed to 22nd street, where he resided until he put away his wife, on the 28th of April, 1849. [*fo.* 7, 40, 53, 54.]

During the first eighteen months and the last two and a-half years of this period, Mrs. Bedford, afterwards Mrs. Underwood, a witness in this case, was their housekeeper. [*fo.* 199, 153.] In the interim, Margaret Sinclair, a younger sister of Mrs. Forrest, afterwards Mrs. Voorhies, filled that office. [*fo.* 200, 598, 1621, 1622, 343, 344, 391, 1282.]

As Mrs. Forrest had no children, Miss Margaret and a still younger sister [*fo.* 219] named Virginia, resided with her. Miss Margaret possessed musical talents. [*fo.* 1161, 1489, 168, 1468, 1469.] She seems to have been very amiable ; [*fo.* 1458 ;] and until the eventful year 1848, subsequently to her marriage, she does not appear to have inspired Mr. Forrest with any aversion. [*fo.* 866, 955, 679, 255.] By the fall of 1849 he had become hostile to her. [*fo.* 671, 610.] See *fo.* 154, 155.

Both in his affidavits on incidental motions, [*fo.* 750, 751, 753 to 760, 950 to 956,] and on the trial, by his vile witness, Garvin, [*fo.* 290, 1281,] and otherwise, [*fo.* 1144 to 1157,] he has stuffed the case with irrelevant attacks upon this accomplished lady. He made most unworthy attempts to prove that she and her husband had anticipated the public solemnization of their nuptials. [*fo.* 751, 507.]

This young lady, prior to her marriage, was visited with entirely honorable views by Mr. Raymond, one of the witnesses. (*fo.* 1309, 1282, 1283, 1296, 1301, 1257.) Raymond remained on intimate terms with herself and her husband after the marriage. His relations with Miss Sinclair, and consequent intimacy with her elder sister, who stood to her *in loco parentis*, were subsequently, with a consciousness of violating truth and justice, made a pretext by Mr. Forrest for injurious imputations against his wife. [*fo.* 1312 to 1322.]

The great intimacy between the two sisters and Mrs. N. P. Willis and a musical evening which they spent with Richard Willis, a younger brother of N. P. Willis, form a large portion of the kitchen testimony put in by Mr. Forrest. [*fo.* 1464 to 1470.]

The charge that Mr. Richard Willis was a paramour of Mrs. Forrest, seems to have been made artfully and in bad faith, as a cover for irrelevant testimony intended to throw a slur upon the domestic relations of Mr. N. P. Willis. [*fo.* 164, 258.]

Mrs. Forrest.

On the 23rd June 1837, during his first and eminently successful professional visit to England, Mr. Forrest married the plaintiff, then Miss Catharine N. Sinclair. (*fo.* 4, 39.) Her father, previously a vocal performer at Drury Lane and Covent Garden, had then retired from active employment, (*fo.* 2912,) and was living in London in a moderate but very respectable style. Her mother was a lady of reputable connections. [*fo.* 2907.] The bride was 19 years of age, had enjoyed the best social advantages, was well educated, highly accomplished and possessed great personal attractions. [*fo.* 2756, 2905 to 2908.]

Speaking of her "grace and beauty," in reply to Mr. Forrest's Counsel on cross-examination, the only witness

examined to the point, said "she was to me the perfection of beauty. She, was the most beautiful creature I ever saw." [fo. 2915.] She had no fortune.

Mr. Forrest soon returned to the United States with his young bride. [fo. 637.]

Attention must by and by be drawn to a dispute which occurred at midnight on 18th January 1849. Until that date, the union was apparently of the happiest kind and the conduct of Mrs. Forrest commanded unqualified approval. Nor had her husband entertained the remotest suspicion of her purity if, indeed, he has ever doubted her.

Mr. Forrest in his answer avers on oath that "until January 1849 he had been ignorant and unsuspecting of any unchaste or immodest conduct on the part of his wife" and that he "always had implicit confidence and full belief in her chastity." [fo. 49.] He also swore in Nov. 1850, that "he had always been in his relations with the plaintiff affectionate and happy." [fo. 847.] On May 2, 1849, just after he put her out of his house, he read and approved a letter from his agent, Lawson, to her father, stating that in the matter of the separation she had "conducted herself, as she always does, with admirable discretion," that her "honor is unsullied, not a breath of suspicion can touch it, and all who know her will bear testimony in her favor," that she and her husband were then "warmly attached to one another." [fo. 721, 722, 627, 628, 565, 606.]

That their intercourse was to all appearance, kindly and affectionate, is testified to on all hands. [fo. 151, 637, 224, 577, 578, 603, 1116 to 1138-1770.]

She was uniformly dutiful and affectionate in her demeanor toward Mr. Forrest. And went on a journey to visit his mother in her last illness. [fo. 244.] She was prudent and economical, keeping exact accounts of her family expenses. [fo. 3105 to 3107, 3109, 3395 to 3422.]

She always made his theatrical wardrobes. [fo. 246, 1292, 1669, 1124, 1592, 1617, 1618, 1626, 1627, 1639.]

And in this employment she labored diligently down to the very moment of her expulsion from his house. [*fo.* 99]

During this period Mr. Forrest was steadily rising in professional distinction and enlarging his fortune. Mrs. Forrest's manners contributed to his eminence, and drew from him frequent expressions of admiration.

He writes from Boston [*fo.* 1647]: Mr Mackey "spoke of you in terms of unmitigated praise, and said you were every way worthy of my most devoted affection. Of course, he made a conquest of my whole heart. I do love to hear you praised, and value it most highly when, as in the present instance, it is the spontaneous offering of the candid and the good." Again from Norfolk, Va., [*fo.* 1657,] "I am glad to hear that you had a call from Mr. Davidge.* He gives you great praise for your polite and gracious conduct on the occasion. Of course, I am sure of that."

For the opinion of others, see *fo.* 603, 609, 210.

In his letters he constantly expressed for her the greatest affection, [*fo.* 1606, 1613, 1615, 1654, 1773, 1654, 1622, 1653, 1775, 1778,] and spoke impressively of the delights of *home* with her. [*fo.* 1599, 1645.]

This continued as late as December 15, 1848. [*fo.* 1599.]

Mrs. Forrest's intellectual character may best be judged from her two letters to Mr. Forrest on 24th and 29th Dec., 1849, [*fo.* 1105 to 1114,] her remonstrance addressed to the Pennsylvania legislature in March 1850, [*fo.* 1963 to 1976,] and finally, by a private letter to Lawson, invoked by Mr. Forrest to excite a prejudice. [*fo.* 682 to 699-688, 698.]

On the 23th of April, 1849, Mr. Forrest, having broken up the city residence in Twenty-second street, accompanied his wife in a carriage to the house of Mr. Park Godwin, a gentleman of high character well known in polite and literary circles, and there left her as an inmate.

n to
9c

Mr. Godwin's accomplished lady is the daughter of Mr. William C. Bryant. For all these persons Mr. Forrest always professed the utmost respect and friendship. Another Miss Bryant, aged seventeen, resided with Mrs. Godwin. [fo. 719, 720, 1032-53, 91, 681, 496, 923, 497, 498.]

At the separation Mr. Forrest retained the picture of his wife and gave her his own. The latter was taken with them in a carriage to Mr. Godwin's house. He also presented her a copy of Shakspeare's works, writing in the fly-leaf, "*Mrs. Edwin Forrest from Edwin Forrest, 27th April, 1849.*" [fo. 92 to 95, 99, 1034, 1037, 854, 186.]

Neither at or before this separation, nor after it, until late in Dec., 1849, did Mr. Forrest ever utter, in the hearing of any third person, a word of reproach against his wife. [fo. 564.]

Certainly for many months, perhaps for years after the separation, Mr. Forrest had no fixed home. [fo. 590 to 593, 274 to 276, 88, 126.]

Mrs. Forrest's course was different. In May or June, 1849, Mr. Forrest, or his agent, Lawson, having fixed her allowance at \$1500 per annum, [fo. 592 to 597,] she staid for a while at Mr. Godwin's, paid a month's visit to Mrs. N. P. Willis, [fo. 1459] spent a part of midsummer in the country, and by October, 1849, established herself in a small house in Sixteenth street, N. Y. [fo. 1036, 1037.] Her young sister, Virginia, her sister Mrs. Voorhies and the child of the latter, here formed her family circle. [fo. 861, 2444.] She continued to reside in this house until the jury-trial in January, 1852.

Mr. Forrest.

On the 18th of January, 1849, Mrs. Forrest and many highly respectable persons, attended a farewell party given by her sister, Mrs. Voorhies, on the eve of her de-

parture with her husband to California. [*fo.* 951, 952.] She reached home at or after midnight. [*fo.* 217, 218, 287 to 288, 499 to 502, 606.] She then had an interview with Mr. Forrest; he spoke offensively of her sister—precisely what he said cannot be proven and they disagree about it. But they agree in this: she responded in great anger, "it is a lie;" and thereupon, instantly, without assuaging or pretending or, in fact, supposing that he had any other cause of offence, he declared that he would not live with a woman who questioned his veracity, and, at, and from that instant, the separation now existing was decreed. [See his affidavit, *fo.* 750, 751-768, 769.]

A pitiful attempt was made to establish that Mr. Forrest, having that evening found the much talked-of "Consuelo" letter, pronounced the sentence of repudiation from a belief or suspicion of guilt in his wife. This is absolutely falsified by himself, on oath, and by all the circumstances.

He pretends that he found the letter that evening but that "he hoped the manuscript was merely an extract from a licentious French novel; he determined, therefore, to take no measures upon the subject until he had fully informed himself upon these points." [*fo.* 768.] He adds that "after some days inquiry" he "ascertained, &c." concerning this letter, and on the evening of the 20th January, 1849, spoke to her upon the subject. [*fo.* 770 to 773.] Mrs. Forrest essentially agreed with him as to the cause and manner of the quarrel and decree of repudiation, and shewed conclusively that it was produced by her angry retort about her sister and nothing else. [*fo.* 910 to 918, 951 to 954. See 1021 to 1024.]

[See *fo.* 631, 632, 500 to 502, 287, 288, 181 to 185, 323.]

In order to form even a conjecture of his motives in repudiating his wife January 18, 1849, it is necessary to look closely into his character.

His love-making on paper, at a distance, was not well sustained at home. At least so thought one highly intelligent observer. [*fo.* 95, 98, 99, 879.]

He was an actor and kept late hours at home and abroad. [*fo.* 1581 to 1589, 1311.] His associates were generally persons of "vulgar habits and conversation." [*fo.* 1526, 1527, 309.] His pleasure was to smoke, drink and talk with his male attachés on Sundays and all night. [*fo.* 298, 927, 928, 251 to 253, 538; 539, 544.] See *fo.* 251. His professional interests required him to cultivate the acquaintance and good will of persons engaged in literary pursuits, especially if connected with the press; but he did not covet their society. [*fo.* 923, 504, 1773.]

It was his habit to permit Captain Howard, Lawson and others to lodge in his house. [*fo.* 334, 371, 699, 1581.]

Whilst living in matrimony with his beautiful and accomplished wife, confident of her love and fidelity, enjoying her labors in his service and her gentle submissiveness to his will, and professing toward her emotions of pride and affectionate admiration, he was for a series of years a habitué, in the day-time, of a notorious brothel. [*fo.* 1200 to 1214, 1235, 1548.] On the trial he neither cross-examined the witness who proved this disgraceful fact, nor attempted to dispute it. [*fo.* 1214.]

As a witness on the trial he refused to deny his adultery with a specified actress. [*fo.* 91.] And the fact was fully substantiated by a respectable and unquestioned witness. [*fo.* 1195 to 1200.]

He evaded a direct denial of his adultery in the pleadings. [*fo.* 46, 870, 871.] Indeed, he never has denied in any form, his coarsely adulterous life; and, it may fairly be presumed, that he is too proud of it [*fo.* 1436,] to record a denial even without oath.

His shocking course in the procurement of witnesses, &c., after he had in December, 1849, imputed crime to his wife, is a fit supplement to this narrative. This will be stated hereafter.

Still why did he repudiate his wife?

In 1848-9 he had reached the age at which the grosser specimens of mankind are apt to develop their least amiable traits.

"All that gives gloss to sin, all gay,
"Light folly passed with youth away,
"But rooted stood in manhood's hour
"The weeds of vice without their flower."

Rokeby, Canto 1, Stanza 9.

In Mr. Forrest's case, circumstances favored this development at this very point of time. The Macready feud was pending and had reached its second and worst stage; his temper was greatly soured. Poor Margaret Sinclair's marriage had raised doubts whether she worshipped him.

The Fonthill enterprize had just reached an eminence whence he could look out upon the dreary future in which its completion necessarily involved him. Yet he was accustomed to live upon that very kind of popular applause which changes to scorn on its hero's failure in *any* undertaking. It was not a grateful thought that Fonthill Castle should change its name to Forrest's Folly. He has always been exceedingly parsimonious. [*fo.* 945, 664, 741, 1038, 1051, 1161.]

The softening influence of a mother had just been withdrawn. [*fo.* 271.]

The notoriety of his pending feud with Macready, and the horrid massacre of May 10, 1849, of course drew great attention [*fo.* 658,] to Mr. Forrest's co-temporaneous repudiation of his wife. She was Macready's country-woman. [*fo.* 701, 535, 1531, 785.] Mr. Forrest did not choose to state a cause, he would not admit that it was his fault, and his wife said it was hers. [*fo.* 511, 961, 569.]

It would be tedious to detail Lawson's story about his efforts to find out the *cause* and his alleged gossiping conversations about it. At last, about the middle of Decr.

1849, Mr. Forrest, in talk with Lawson, charged his wife with impurity. [*fo.* 658, 660, 642, 633, 654, 655. See 566, 651, 661, 717.] It will be seen that this zealous servitor soon after this fished up from the kitchen some inculpatory witnesses; but, long before he had done so, and before any witness whatever had been found, say in Dec. 1849, or perhaps somewhat earlier, Mr. Forrest had employed counsel in Pennsylvania and New York, to aid him in obtaining a foreign legislative divorce. [*fo.* 1233.]

Mr. Forrest's pretence that he questioned his wife's purity from and after Jan. 18, 1849, is met by his occupying the same bed with her every night for the three succeeding months. [*fo.* 245, 939 to 942.] See *fo.* 448, 451, 453, 456, 459.

His pretence that he kept the cause of his separation a secret, from motives of delicacy, is put down by many circumstances.

1. As early as May or June, 1849, when he found that his wife would not be put off with \$500 a year, it required Lawson's urgency to prevent his resisting and proclaiming his reasons. At least this is so, if Lawson can be credited. [*fo.* 593, 666.]

2. If he was conscious of having suffered a wrong and desirous of concealing it, he would have been delighted to find the separation imputed to the Macready feud, or to some disagreement between him and his wife on that subject. Yet a misrepresentation, as he calls it, to this effect, and which he chooses to impute, in some measure, to his wife or her friends, is his pretended motive in his total change of policy. [*fo.* 785, 960 to 965.]

3. His whole course in resisting the demand for alimony, indicates that avarice was his prime motive.

His true nature is shewn by the following and many other like circumstances :

1. His attempt to entrap his wife into an implied admission. [*fo.* 1101 to 1116.]
2. His attempt to bribe and seduce Jamison to slander her. *See Forney's evidence and letter.*
3. His attempt to obtain a sham divorce from a foreign legislature.
4. His attempt through Ann Flowers to draw his wife into degrading associations in Mercer street.
5. His pertinacity in assailing her by means of witnesses palpably unworthy of credit.
6. His gross abuse of herself and of all who harbored her, allowed her the common privileges of humanity, shewed her the least courtesy or extended to her the simplest courtesy. [*fo.* 1902, 1911, 1941 to 1947, 1009, 1010, 1408 to 1422, 1702—3108.]

Third Head: *Mr. Forrest's Manoeuvres to obtain a Legislative Divorce in Pennsylvania.*

His first step was a letter designed to entrap her into an implied admission to be inferred from the inexplicitness, if any, in her denial. [*fo.* 1101 to 1116, 797, 855.]

Though not his inferior in any point constituting a mental excellence of either sex, she was singularly submissive to his will. She at once acquiesced in his desire for a divorce, provided no criminal imputation should be made.

Of course, some provision was to be made for her; and, at last, early in January, 1850, she obtained counsel. [*fo.* 1089, 1220, 1700.]

The respective counsel had an interview accordingly, on January 28, 1850. [*fo.* 1229.] His counsel disclosed that they did not hope to obtain a divorce for "incompatibility of temper," [*fo.* 926, 128,] but on some softly worded charges, and on proofs known only to "a few leading members of the Legislature," and never to be placed on file or published. [*fo.* 1226, 1227, 1230.] Her counsel pronounced this impracticable, and positively refused to

acquiesce in any impeachment of her purity. [fo. 1049, 1050, 1216, 1227.] This practical difficulty induced his counsel to pray in aid the services of Mr. Bryant. [fo. 1230 to 1232, 1699 to 1701.] At this time, i. e. after Feb. 1, 1850, certain affidavits of servants had been procured which were full of offensive things. They were shown to Mr. Bryant. [fo. 1711, 1712.] Their publication must have been unpleasant to every one alluded to in them, however casual or incidental the allusion. [fo. 2014 to 2053.] Mr. Bryant's amiable and accomplished family were intimate friends of Mrs. Forrest. No gentleman of delicacy, in his position, could have failed to be an ardent champion of secrecy and settlement. Mrs. Forrest consented, but on the usual terms. [fo. 1701, 1707, 1711 to 1714—fourth clause 1710, 1716.] This led to an appointment of an interview with counsel on Feb. 15, 1850. [fo. 1702, 1705, 1221.] In the interim the intended petition to the Legislature came to her hands. It was in the form subsequently used, except that it did not then contain the word "criminal." [fo. 125, 1234.] She declined to keep the appointment, [fo. 1706,] or to acquiesce in the intended petition, for the reason that, though "couched in delicate and decorous language," it was nevertheless "a charge of criminality." [fo. 1223, 1234, 1222 to 1226.]

The narrative of these transactions is gathered from the testimony of *Theodore Sedgwick*, [fo. 1214 to 1235,] and *William C. Bryant*, [fo. 1699 to 1717.]

Mr. Forrest's formal hostilities commence.

On 19th Feb. 1850, Mr. Forrest gave notice of his intended application to the Legislature of Pennsylvania for a divorce. [fo. 142, 126 to 132.] Mrs. Forrest presented her protest against the proceedings, but declined to appear. [fo. 1963 to 1976.] He produced about 100 folios of *ex parte* testimony. [fo. 1976 to 2089.] The di-

vorce was refused ; but he obtained an act abridging the required term of prior residence, [*fo.* 857,] and on 7th Aug., 1850, petitioned the Philadelphia Common Pleas for a divorce. [*fo.* 2532 to 2534, 2537 to 2550, 2090 to 2103.] On Sept. 11th, 1850, Mrs. Forrest obtained an injunction in the New York Supreme Court, restraining this action in the Philadelphia Court. [*fo.* 2278.]

Henceforth Mr. Forrest is a Defendant.

Defence was easy enough, but Mrs. Forrest had no knowledge, and as yet no proof, or clue to proof, concerning Mr. Forrest's guilt. Still, this action was commenced in Nov. 1850. [*fo.* 3.] Its progress, the proceedings had, and results, have been stated under the first head.

Fourth Head: *Course of the trial.*

The rules touching the order of proof were not applied until January 15th, after there had been alternate rests, and the case had been a month on trial.

See *Herald Reporter's Ed. of "Forrest Divorce Case,"* certified by Mr. Forrest and his counsel, pp. 12, 127, 79, 2, 120.

Edwin Forrest himself was called as a witness, and he refused to answer whether or not he had committed adultery with a specified woman. [*fo.* 91.]

An *admission* by the defendant that he "had been in the habit of visiting houses of prostitution for the purpose of there having illicit connection with lewd women," was offered, objected to by the defendant and excluded, because not "immediately connected with, and in corroboration of a fact otherwise proved to have occurred." [*fo.* 102.] One witness gave evidence tending to prove illicit commerce between the defendant and the woman aforesaid. (*fo.* 105 to 113.). Mr. Forrest's pe-

titions to the Legislature of Pennsylvania and to the Philadelphia Common Pleas, were put in, and the plaintiff rested. (*fo.* 114 to 148.)

Had the defence also rested at this point, perhaps the jury would have acquitted him for want of sufficient evidence. But he proceeded to inculcate.

Deming, one of Mr. Forrest's tenants, brought in at a late hour, and four servants, *Christiana Underwood*, formerly Bedford, *Robert Garvin*, *John Kent*, and *Ann Flowers*, were his inculpatory witnesses. James Lawson, his agent, was, as a witness, a sort of actor of all work, but not an impeaching witness.

Their Testimony.

Christiana Underwood. [From *fo.* 148 to 270.] Aged fifty-eight. [*fo.* 148, 199.] Had been acquainted with Mrs. Forrest's family, and, doubtless, a hanger-on for forty years. [*fo.* 149.] Emigrated in 1837, just prior to Mr. Forrest's return with his young wife; kept house for them—eighteen months—whilst they lived in Reade St. [*fo.* 149, 151, 199.] Afterwards, say in January 1847, became Mrs. Forrest's housekeeper in 22nd street, and remained in that capacity until the separation, May 1, 1849. [*fo.* 153, 201, 202, 204.]

At that time she was in great distress about losing her snug birth; claimed that her appointment was for life, and applied to Mr. Forrest. He denounced her as "a tattler," and treated her with contempt. She exclaimed "what is to become of me;" and Mrs. F. agreed to keep her and support her. [*fo.* 190 to 192-204 *to* 206.] Accordingly she lived with Mrs. F. in 16th street until Nov. 25, 1849, when she drew into a secret or run-away match an old man of seventy-four, named Underwood. [*fo.* 266, 198, 206 to 208, 241, 238.] See *fo.* 200, 201.

This ingrate's testimony actually amounted to nothing, as will presently be seen; but the *time* and *manner* of

her being secured as an impeaching witness, and the course of the actors in it, i. e., Mr. Forrest and his agent, Lawson, ought not to be left out of view.

To her, as to all the servants, Mrs. Forrest had been uniformly kind. [*fo.* 168, 238, 239, 242.] Yet it seems that in the spring of 1848, without any apparent cause, unless it be some slight improvidence, she addressed to Lawson a sneering insinuation against the *honesty* of her benefactress and employer. [*fo.* 600, 677, 209, 243, 270.] This, be it noted, was months prior to any dispute between Mr. Forrest and his wife; but it was just after the marriage of Mrs. Voorhies and after Mr. Forrest's spleen about it had arisen and developed itself. She saw the coming storm, and began to side with the strong against the weak. Lawson, too, with canny guile and watchfulness, treasured the hint, and traded extensively upon it in the hour of his employer's need. [*fo.* 270, 268.]

On 1st Feb. 1850, just at the moment the respective counsel were trying to arrange the alimony question, so as to permit Mr. Forrest to get a sham divorce from the Pennsylvania legislature, Lawson and this old woman had a talk, in which she agreed to play "tattler" against Mrs. Forrest. [*fo.* 208 to 215, 268, 269, 240.] Soon after, Mr. Forrest called upon her, and made so deep an impression, that she became most anxious to do him "justice," [*fo.* 211 to 213, 267, 268,] and was willing to go about fishing up a witness for him. She "would do twenty—aye, a thousand times as much for him." [*fo.* 268.]

Her wretched *tattle* must be read over, in order to appreciate either its falsity or its insignificance.

1. It seems that, according to her own ideas, "she never saw any man take improper liberties with Mrs F."

[*fo.* 241.] But she swore, and indeed this was *her only* assertion of any *offence* by Mrs. F., that in 1844, six years previously, N. P. Willis kissed Mrs. F. [*fo.* 156 to 159.] She admitted that long after this she spoke highly of Mrs. Forrest to her employer, Hon. James Harper—"at that time" thinking Mrs. F. "a very nice lady. • I then knew nothing to the contrary." [*fo.* 202 to 204.] When this inconsistency was drawn to her attention, her get-off was, that she "forgot all about it"—and that "there's no great harm in a kiss." [*fo.* 256, 257.]

2. She swore that, after her interview with Lawson, when Mr. Forrest called upon her, she tried to throw him off the scent. (*fo.* 212.) The whole tenor of her testimony disproves this.

3. She positively denied having said to Mrs. Longstreet, landlady of the 16th street house, that Mrs. Forrest was a correct person, and swore that that lady made unfavorable insinuations against Mrs. Forrest. (*fo.* 263, 264.) Mr. and Mrs. Longstreet contradicted her. (*fo.* 1448, 1449, 1453.)

4. In her *ex parte* deposition for the Pennsylvania legislature, she swore thus: "Mrs. Forrest LEFT Mr. Forrest in the month of May, 1849 or thereabouts; went travelling for four months or thereabouts." &c. (*fo.* 236.) And that she gave her testimony *reluctantly*. (*fo.* 239.)

5. Compare *fo.* 199 with 207. And 210 with 212, 213.

Robert Garvin, [from *fo.* 277 to 328,] waiter in Twenty-second street, from June, 1848, to March, 1849. [*fo.* 277, 278.]

In Feb. 1850, when Mr. Forrest was getting depositions to lay before the Pennsylvania Legislature, he and his friend Andrew Stevens, called on Garvin "in reference to this divorce," asked him to call at Mr. Sedgwick's and to be a witness for Forrest, who "was going to law." He went and told his story to Sedgwick in the presence of Lawson and Stevens, who wrote it down in the form of a deposition. This very deposition was read over to him and sworn to before a Commissioner, on 28th

Feb., 1850. [*fo.* 291 to 295.] See the deposition itself. [*fo.* 316 to 329.]

This deposition, like the rest of the kitchen testimony, is in the main a parcel of trash. Only certain portions of it are material.

He stated *therein*, [*fo.* 327,] that on entering the dining-room one day after dinner, he "found Mrs. Forrest half-lying, half-sitting in Capt. Calcraft's lap, with her arms on his breast and around his neck." This is decidedly stronger than his testimony at the trial. [*fo.* 281.] But attention is called to it only for the purpose of showing that he inculpated her decidedly *at that time*. [*fo.* 323.]

At *fo.* 322 he made his best effort to involve N. P. Willis. He says Willis stayed long alone with her in the back drawing-room in the dark, the rear window-blind being closed. So it was left as an inference that Garvin could not and did not *see* anything. [*fo.* 321.]

At the trial, he swore that he *saw* them in that room on the sofa "kind of lying on each other." [*fo.* 284, 303.] He also said, after Willis left, "I went into the drawing-room to see what I could see after the sights I had seen on the sofa; I called Ann O'Brien, the cook, to witness; I showed her the hair-pin and the garter [found on the floor,] and told her what I saw." [*fo.* 306.] "I believe I told him [Sedgwick] this story that I have told now about N. P. Willis lying on the sofa with Mrs. Forrest." [*fo.* 293.] "I told him all I knew; and I think I told of this affair on the sofa. I told him all I knew about Mr. Willis." [*fo.* 307.]

The above statement in *fo.* 322 of his deposition was then read to him and he was required to explain the discrepancy. [*fo.* 307.] Let us have his explanation: After stating that there were many visits of that kind, the blinds being "usually shut up," he says: [*fo.* 308,] "I told that sofa-business to Mr. Forrest afterwards, a considerable time after the first statement. I did not wish to make it public at first. It was within six months after the first statement." He testified that this was

his own spontaneous act "to do justice to Mr. Forrest." [fo. 309.] "Mrs. Forrest was always very kind to me. I did not wish to state it; they did not ask me the question; I did not wish to let it be known what I knew about the sofa affair when I was at the Astor House, [where the deposition was sworn to,] as they did not know that I knew it; and I did not tell them; I was desirous, at that time, of telling as little as I could against Mrs. Forrest; I kept that back. I may have said, upon my cross-examination this day, that I had told Mr. Sedgwick the story about seeing Mr. Willis and Mrs. Forrest lying on the sofa; I don't remember. When I made the statement to Mr. Sedgwick, I intended to keep back that about the sofa. I did not tell Mr. Sedgwick anything about my seeing them on the sofa." (fo. 310, 311, 312.)

A juror inquired if he "liked Mrs. Forrest" and "did not wish to expose her," why he called "a witness to see the garter and hair pins." This was a puzzle which he could not solve. (fo. 314.)

The Chief Justice, convinced that he had equivocated about the alleged subsequent interview with, and disclosure to Mr. Forrest, (at fo. 309, 310,) now asked how that conversation commenced. (fo. 315.) He responded:

"I told Mr. Forrest I had something more to tell as the cause was going into court, as he was going to have a divorce it was right he should hear it."

He had already sworn that Stevens spoke to him "in reference to this divorce," and asked him to go to Sedgwick's to be a witness for Mr. Forrest who "was going to law." (fo. 292.) So the Chief Justice, (at fo. 315,) very reasonably inquired: "When the statement was read over to you at the Astor House did you know there was any proceeding for a divorce?" The answer is somewhat queer: "I did not then know *particularly* of there being any proceedings for a divorce."

He evidently affected ignorance of Ann O'Brien's

whereabouts. (*fo.* 306.) Surely there could be no doubt as to the character of this witness, independently of the point blank refutation of his falsehoods at (*fo.* 1281, 290) and elsewhere.

Lawson at *fo.* 576 made an attempt to support Garvin, but its only effect was to reflect discredit on himself.

Ann Flowers, (from *fo.* 329 to 410-546.) A servant in Mr. Forrest's house from May, 1844 to April 1, 1845. (*fo.* 330, 339.) Perhaps she was Mr. Forrest's only point blank witness. She swore positively to an act of adultery with Capt. Howard on (say) 1st Sept., 1844, when, *as she testified*, the witness was about fifteen years of age. (*fo.* 339, 368, 372.)

On May 25, 1845, whilst living at Norwalk, Ct., under the assumed name of Mrs. Elmendorf, she was delivered of an illegitimate child. (*fo.* 391, 546, 1397, 1679.) Her prior experience in life had been considerable. Four years and a-half previously, she had been sent to the House of Refuge, for theft. (*fo.* 369, 370, 379 to 383.) She was thence sent as an apprentice to a Mr. John Dickinson at New Canaan, Ct., with whom she lived from March 31 to Dec. 3, 1840. (*fo.* 1331, 1333, 1323.) On her cross-examination, she positively denied being sent to the service of Dickinson. (*fo.* 370, 379.) There can be no doubt that, in Sept. 1844, instead of being only fifteen, she was over twenty years of age. (*fo.* 383, 1324, 1330, 1336, 1405.) Between her stay at New Canaan, in 1840, and her lying-in trip to Norwalk, in 1845, she paid a visit to the latter place in 1843, and boarded there for three months under the assumed name of Miss Adams. (*fo.* 1397.)

She alleged herself to have been an extremely helpless child of about nine years old when sent to the House of Refuge. (*fo.* 369, 370, 379 to 384.) Yet she stated that she *then* coined and uttered an artful lie in respect to her age. (*fo.* 382.) She admitted that in 1850, when she came from New Orleans to New York, to be a wit-

ness for Mr. Forrest, (*fo.* 346,) she forged another very artful lie and practised an elaborate series of deceptions, at the instance of Mr. Forrest and his agents, and with their aid, "on purpose to deceive Mrs. Forrest." (*fo.* 395, 355 to 360, 362 to 366, 408.)

Her reputation was always bad, according to her own account, (*fo.* 384,) her mother's, (*fo.* 1547, 1548,) and that of others. (*fo.* 1323, 1325, 1335, 1370, 1404.) Of course, some people were found who knew nothing against her. (*fo.* 1677, 1680, 1684, 1717, 1719, 1723.)

She testified that Mr. Forrest would not let her speak to him, (*fo.* 343, 410,) that Mrs. Forrest *always* treated her "with the greatest kindness," (*fo.* 368, 343,) so much so that when she tried, by lies, to lure Mrs. F. into an obscure and suspicious hole, in 1850, her "object was friendly," and she "was at that time and *always had been* friendly to her." (*fo.* 408, 359.) Yet she pretended that she came on to New York from New Orleans, in 1850, as a volunteer witness for Mr. Forrest, and strove to make it appear that she came at her own cost. (*fo.* 348 to 350.) But taking her whole story she negatived the latter idea. (*fo.* 346 to 348, 361.)

When in 1850 Mr. Forrest was fishing up witnesses he bethought himself of this girl. He went to see her mother, and there learned her utter worthlessness. (*fo.* 1543, 1547, 1548.) He then advertised for her in New Orleans that "she would hear something to her advantage," (*fo.* 346, 347.) He got her to New York in 1850. Here, with her and his man Dougherty, he concocted and carried through to an unsuccessful issue, a vile scheme of falsehood and deceit, with the view of getting Mrs. Forrest into the company of Dougherty and this woman in a back upper bed-room of a Mercer street hotel or lodging house. (*fo.* 408, 395, 355 to 360, 362 to 366.) To complete the theatrical display, the windows of this bed-room were darkened. (*fo.* 1670 to 1672.)

Independently of her personal want of credibility, her testimony in inculpation of Mrs. Forrest, was of a kind to baffle even the most uncharitable credulity. Substantially it was as follows : About 30th August 1844, Captain Howard slept a night in the next room to Mrs. Forrest's bedroom. Then for the first time (fo. 335, 367, 368,) Mrs. Forrest asked Anna to sleep with her. About 11 o'clock Mrs. F. came into her room where Anna lay, and by the light of the lamp on the hearth undressed for bed. She then went to Howard's room. Anna heard "whispering and a noise of the bedstead." So, says she, "I took the lamp in my hand into Howard's room and looked into the bed, having the lamp in my hand. When I saw the way they were I turned to the door and began to cry. I did not make a noise in crying for I was frightened; but merely shed tears. I cried loud enough for her to hear, and said 'Mrs. Forrest.' I continued crying. It was a very few minutes before she said anything. When she did answer she said 'Anna, what's the matter?' I said I was afraid to sleep alone. To that she said nothing. I took the lamp and went away." (fo. 374-335 to 338, 372 to 375, 385.)

She swore that she told this story to her mother the next morning. (fo. 375.) Her mother contradicted this. (fo. 1539.)

Catharine Levins, a perfectly trustworthy witness, (fo. 1389, 1694,) proved Anna's continual illicit intercourse with one McCabe at the time in question. (fo. 1369 to 1371, 1371 to 1377, 1380 to 1387.) Anna denied this; (fo. 1377, 1378;) but it was confirmed. (fo. 1395, 1396, 1274, 1276, 1298.) McCabe, himself, testified to it; but, at the time of the trial, he had become so much of a drunkard, that he was entitled to little credit. (fo. 1406 to 1422.)

On her cross-examination Anna swore that in 1850, on her way to New York from New Orleans, to be a witness, she visited a married sister at Havana, and did not disclose to her the object of her visit, but on the con-

trary, told her what "was not the truth." The alleged cause or motive of this suppression and falsehood was that her family had forbidden her to appear against Mrs. Forrest. (fo. 350.) On further scrutiny she showed that the prohibition, (if any,) was subsequent to this time. (fo. 351 to 353.)

To cap the climax of her stories and her adventures, she stated, in substance, that having on the next morning told Mrs. Forrest what she had seen, Mrs. Forrest requested her to keep it a secret, and formed a successful conspiracy with Capt. Howard to ruin her. That Mrs. F. paid a three days visit to Philadelphia, and concerted the absence of the other servants whilst Howard came and ravished her, in spite of her hallooing, *but not as loud as she could.* (fo. 402, 403.) She further stated that immediately after Howard ravished her, they became amatory associates; that she voluntarily spent the next evening with him, and had an understanding with him that he could have access to her whenever he spent a night in the house. (fo. 385 to 391, 397 to 406.) See what C. Levins proved touching this alleged rape. (fo. 1371 to 1374, 1387, 1388.) Anna testified that Mrs. Forrest, through the agency of her sister, Miss Margaret Sinclair, helped her through her lying-in, &c., &c. (fo. 340 to 344, 391 to 394, 407, 409, 723 to 729.) That Margaret and her friend Raymond did so, was admitted. (fo. 1272 to 1280, 1298 to 1304.) The motive of the latter was friendship to Howard. Anna charged him *in bas-tardy*; (fo. 378, 393, 406,) and he, being a married man, was obliged to stifle the prosecution.

Defendant founds many of his exceptions on the cross-examination of this witness.

1. On the direct the defendant drew from this witness that she had the said child; that Mrs. Forrest, to some extent, provided for it, and that Anna charged her with being "*her ruin*," and told her she "was going to ask Mr. Forrest if he would not see Capt.

Howard about doing something for her child." (*fo.* 340 to 343.)

This extraordinary statement, full of obscure insinuations of guilt against Mrs. Forrest, rendered it desirable to get out the fact, that Howard, whom she alleged to be the paramour of Mrs. Forrest, was claimed as her own, *at the very moment of the alleged adultery*. So she was asked who was her child's father, and *when* was it born. This was objected to, and excepted to for irrelevancy. (*fo.* 377.)

Surely it was not irrelevant. The first point was already in.

See opinion of Court below. (*fo.* 3511 to 3518.)

2. The defendant resumed the direct examination of this witness, (*fo.* 385 and onward,) gave evidence of the alleged conspiracy and rape, and by her testimony and that of another witness named Ann Butler, (*fo.* 723,) in despite of objection by plaintiff, (*fo.* 391,) gave a long narrative of the acts of Margaret Sinclair and Mr. Raymond, as imputed agents of Mrs. Forrest, in taking care of the child. (*fo.* 389 to 395, 723 to 729.)

Neither the pretence that she was a chaste, innocent young girl, nor this terrible imputation against Mrs. Forrest, of plotting and accomplishing her ruin, could be permitted to pass unanswered. And the Court allowed against exceptions :

- a. Proof of her being older. (*fo.* 1193.)

- b. Proof that she was not previously chaste and innocent. (*fo.* 1325.)

The first exception, (*fo.* 1193,) does not deserve the elaborate answer given to it in the Court below. (*fo.* 3627 to 3632.)

As to the second, [*fo.* 1325,] the Court below has given a full answer. [*fo.* 3645 to 3655.]

John Kent, (from *fo.* 460 to 495.) This man was waiter to Mr. and Mrs. Willis, from Feb. 1849, to July, 1850,

(*fo.* 460.) Thence, until the trial, with one interval, (*fo.* 472,) he seems to have been out of regular employment. He was a longshoreman, (*fo.* 477,) and quite a rambler. Whilst "looking for employment" in the summer of 1851, (when, of course, the papers were full of this case,) knowing *Stevens* to be "a friend to Mr. Forrest," he, of his "own accord, went there to say that" * * he * * "would like to see Mr. Forrest to testify what" * * he * * "had seen between Mrs. Forrest and Mr. Willis." (*fo.* 467 to 469.) He virtually became errand-boy for Stevens and was fed with moneys from time to time. (*fo.* 473 to 478.) "The errands were pretty much all about Mr. Forrest's case." (*fo.* 475.)

This man was from "Europe" (*fo.* 459.) He was recommended by a person in Ireland, but she was "an English lady." [*fo.* 490.] The defendant's counsel was not as sensitive as the witness, on this point, and pushed him to be a little more definite. It came out, indeed, that he was from "the County of Tipperary." [*fo.* 460.] But, except to those versed in topography, the country of his birth, like the allegation that Mr. Forrest hired the rooms in Mrs. Ingersoll's brothel as "a private oratory," remains among the things not proven. *Ciucci v. Ciucci*, *Eng. L. & Eq. Rep.* 625—18th *Lond. Jur. Rep.* 194.

He thus testified concerning an interview with Genl. Lyman. [*fo.* 478]. "I told him I knew nothing of it; I knew nothing against Mrs. Forrest or Mr. Willis." This was "because Mr. Stevens told me, if any one should ask me any question, to tell them I knew nothing of it. What I said to Genl. Lyman was untrue. I had no other reason for saying so to him except from what Stevens told me. I do not always say what Stevens tells me, whether true or false."

In April or May, 1850, whilst Mrs. Forrest was living in Sixteenth street, a repudiated wife, and Mr. Forrest was lobbying at Harrisburgh for his legislative divorce, [*fo.* 275,] Mrs. N. P. Willis lay extremely ill in charge of

Mrs. Benson, a nurse. One night she wished that Mrs. Forrest should come and relieve the nurse by sitting up with her. At her request, N. P. Willis sent for Mrs. F. who came accordingly. The nurse interposed a negative, unless Mrs. F. should be actually needed. So, to be ready at call, she was sent to sleep in their only spare bedroom. It was in the third story. [*fo.* 461, 463, 1459 to 1464, 1522 to 1523.]

John Kent swore that between 11 and 12 o'clock, when he was on the flight of stairs leading to the third story, there being "something less than 20 steps between" him and the top of the stairs, he "caught a view of Mr. Willis; * * he was just coming out of Mrs. Forrest's door." Kent "could not see him if he had his hand on the handle of the door, * * did not see the door of Mrs. Forrest's room, * * heard it closed when he [Willis] came out." [*fo.* 485, 486, 491.] "When he saw me he thought to draw back, but he had come too far, and so he came ahead." He had no coat or waistcoat on, and perhaps no slippers; but "he had the rest of his clothes on." [*fo.* 464.] "He said 'good night dear,' to Mrs. Forrest; he was expressing these words as I came up." [*fo.* 465.] "I heard Mr. Willis say 'good night, dear.'" He was just saying it as I came up stairs. I suppose he commenced it before he saw me, and finished it as I came in sight. I heard that very distinctly. It was in a CLEAR, LOUD, DISTINCT TONE. I did not see the door close." [*fo.* 488.]

Perhaps this tale deserved an answer!

Mr. Willis always slept in his study when Mrs. Willis was ill. [*fo.* 484.] His study adjoined Mrs. Forrest's room, and there was an interior communication between these rooms. The door-lock had the key in it. [*fo.* 486, 491, 1462, 1475, 1476, 1482 to 1484, 1485, 1518, 1519, 1533.]

Mr. Willis' daughter, Imogen, eight years of age, the only surviving child of a former marriage, slept in an ad-

joining room on the same floor. [fo. 488.] She always went to bed early; [fo. 493;] but was a remarkably light sleeper, was often awakened by her father's step, and spoke to him when he was retiring. It was his habit to go into the room and bid her "good night." [fo. 489, 1478, 1518, 1519, 1524.] These facts appeared abundantly by the testimony of Mr. Willis, his lady, and Mrs. Benson, the nurse. Some of them are verified by Kent, and none of them controverted by any witness. Independently of Kent's testimony, which is pretty directly to that effect, it was shewn that from the place at which he stood, he could not have seen the door of Mrs. Forrest's room. [fo. 486, 1462, 1484, 1486, 1559, 1560.]

Egbert Deming. [From fo. 729 to 737]. A tenant of Mr. Forrest in a house fronting on 21st street, testified that about ten o'clock at night in the fall of 1848, [fo. 731, 732,] looking from a room one hundred feet distant [fo. 733,] he witnessed the following scene in Mr. Forrest's library which was then lighted with gas; [fo. 732,] Mr. N. P. Willis and Mrs. Forrest "were standing by the window * * side by side, one of his arms was around Mrs. Forrest. I did not see any other mark of affection between them. I think his other arm was by his side; * * I do not know that I could say where her arms were. I should think by her side. I did not see any thing else pass between her and him. They stood there about a minute, their heads slightly bent forward and they seemed to be in conversation. They then walked away and went to a table * * under the gas-light, * * I saw them by the gas-light, which was in the centre of the room. I think Mrs. Forrest left first and walked around the table and Mr. Willis followed. I did not see them afterwards." [fo. 733.] "Their backs (were to) the window; it was Mr. Willis's left arm around Mrs. Forrest's waist. Mrs. Forrest walked away first; they did not walk away with his arms still around her. She left him." [fo. 734.]

Deming's wife and sister-in-law joined in this story, with some variations. [*fo.* 1758, 1762.]

None of these people had any acquaintance with Mr. Willis or the Forrest family, but professed to have acquired a knowledge of their persons. Indeed Deming himself swore thus; "their backs were towards the window when I told Mrs. Jermain, (his sister-in-law), who I thought they were." [*fo.* 737.] He could scarcely have recognized them under such circumstances, unless possessed of some secret method of ascertaining identity. Perhaps he was; he seems to have had many occupations. [*fo.* 735.—11 How. Pr. R. 382.]

James Lawson [from *fo.* 561 to 643, 1140 to 1144, 1785,] was Mr. Forrest's attaché and agent. [*fo.* 584, 585, 588, 637, 676, 561.] To him Forrest first revealed the *cause* of his repudiation. Though having the highest opinion of Mrs. Forrest, he was the first to fish up from the kitchen the inculpatory evidence. [*fo.* 599 to 604, 633, 642, 576.] He was Mr. Forrest's factotum in this business, and performed all sorts of offices, "boosing" to both parties in a style quite inimitable. [*fo.* 609, 627, 590 to 593, 595.]

But he was ever loyal to the defendant.

He in no respect impeaches the purity of Mrs. Forrest. [*fo.* 603.] Nevertheless he may be regarded as an important witness; for he testifies to many elucidatory facts. And he shows how completely Mr. Forrest had the services of his agents when they were testifying.

He wrote, in all sincerity [*fo.* 606,] the letter of May 1, 1849, to John Sinclair, affirming the high qualities, admirable conduct and "unsullied honor" of his daughter. [*fo.* 574.] He showed that letter, or a copy of it, to Mr. Forrest, who fully approved it. [*fo.* 565, 566.]

On 15th Nov. 1850, Lawson made an affidavit for Mr. Forrest, to be used on one of the motions. [*fo.* 648 to 661.] Its object was to deny a verbal statement imputed to him, that Forrest himself had acquitted her of

guilt. [fo. 648.] He denied this ; but, mindful how relevant to this point was his letter to her father, he took care to swear that that letter was "written and sent without Mr. Forrest * * knowing its contents." [fo. 653.] And he closed his affidavit thus : "but never, on any occasion, *could* he have said that Mr. Forrest declared her free from guilt, for that he never did to this deponent." [fo. 661.]

The very point of this affidavit was that nothing exculpatory *could possibly* be imputed to Mr. Forrest in his intercourse with the deponent. At this time Lawson had forgotten his short note to Mrs. F. disclosing Mr. Forrest's approval of the letter to her father. [fo. 627.] This forgetfulness is quite apparent. In the affidavit, he says that he preserved but one copy of the Sinclair letter ; that he *showed* that copy to Mrs. Forrest "*soon after,*" and, at her "special request, gave" it to her. [fo. 653.] By the note itself it appears that on May 2, 1849, the very day on which he mailed the letter, he, spontaneously, *before* seeing her, "*sent*" [fo. 575,] to her his said only copy. [fo. 627.] Before the trial, he was fully advertised [fo. 597,] that he was to be confronted with his note of May 2, 1849. (See Mrs. F.'s affidavit of Dec. 20, 1850, fo. 978, 980, 987.) The very first move on his direct examination was an attempt to wriggle out of this emphatic self-contradiction. See it, [fo. 564, 565, 662.]

This witness was introduced by the plaintiff for an indefinite quantity of incidental points. The aim of some of them is not very apparent. See the whole of the direct examination. [fo. 561 to 583.]

On this first direct examination Lawson testified thus : "I tried every way in my power that I thought reasonable, to bring about a reconciliation up to the last of November, 1849. Mrs. Forrest told me that it was impossible to bring about a reconciliation. I do not know what I said to her ; but I always thought it was possible." [fo. 568.]

Why this evidence was given by the defendant is not perceived; but it was fair evidence for the plaintiff that Mr. Forrest's agent, intimate associate and witness, was for a series of weeks actively negotiating for a reconciliation rather in opposition to the views of Mrs. Forrest. That Mr. Forrest even tolerated this, was some evidence that he did not *then* impute guilt to her. But, at a subsequent stage, Lawson undertook to deny Mr. Forrest's privity in these negotiations. [*fo.* 609, 610.] It was then wrung from him that her letters to him were shewn to Mr. Forrest, or sent for perusal to Mr. Forrest, and received back from him, at least without rebuke. [*fo.* 611, 615.] Lawson, to be sure, added that his letters to Mrs. F. in the course of this treaty, were not written with Mr. Forrest's consent, "except he happened to be present, and I would shew it him." [*fo.* 616.] The Court held that there was sufficient evidence that Lawson was negotiating between them for a reconciliation with Mr. Forrest's knowledge and, at least, without objection by him. [*fo.* 616.] Three of the letters were therefore admitted under *exception*. [*fo.* 611 to 621.]

This negotiation was introduced in the evidence of this witness by the defendant himself; and also some of Mrs. Forrest's remarks in the course of it. Probably these were retailed from the letters, and not oral. [*fo.* 568, 614, 620.] Part of it being thus given in evidence by the defendant, why should the rest be excluded? See *case*, *fo.* 3531 to 3541.

A letter containing complimentary verses addressed to "Consuelo," was received in evidence against Mrs. Forrest. [*fo.* 1094 to 1100.]

There was no evidence that it ever came to her hands, except an implication from an affidavit made by her, which asserted that she had censured it. [*fo.* 888, 905, 882 to 889.]

Its contents did not excite Mr. Forrest to jealousy. The very name by which she was addressed, implied

that in the writer's view, the person addressed was pure and chaste. [fo. 906.]

See also the novel "*Consuelo*."

In order to get this imaginative effusion of another before the jury, the defendant read part of Mrs. Forrest's said affidavit. He excepted to the reading of other parts of the said affidavit, and also, because he was not permitted to read his own. [fo. 743, 868, 1013, 1016, 1091, 1092, 1188.]

An offer was made that the material parts of defendant's affidavit might be read. [fo. 1673.]

A paper signed by Mrs. Forrest called a "declaration of innocence" was put in evidence by Mr. Forrest. [fo. 1189.] He had, no doubt, inserted, after she signed it, much of the matter which it was found to contain at the trial. (fo. 893 to 899, 1142.)

Mr. Forrest's random manner of accusing his wife, is admirably illustrated by certain circumstances :

In his papers presented to the legislature of Pennsylvania in March, 1850, he implicated among the numerous *participes criminis*, Henry Wykoff, Dr. Rich and Professor Hackley of Columbia College, N. Y. [fo. 2036, 2037, 2046.] Then in August, 1850, in his libel for divorce in Philadelphia Common Pleas, he implicated eight persons, omitting Prof. Hackley. [fo. 116 to 118.] On Nov. 11, 1850, he answered Mrs. Forrest's first action for a divorce, implicating six persons, omitting Wykoff, Rich and Hackley. [fo. 2289 to 2292.] On 15 Nov., 1850, he swore to an affidavit again implicating all three of them. [fo. 829, 818, 828.] In Dec. 1853, he put in a recriminatory answer on the same day, omitting all three of them. [fo. 43 to 46.] See fo. 947 to 950.

The most absurd efforts were made to impeach Mrs.

Forrest on irrelevant topics, such as the pretence that she drank wine rather freely, [*fo.* 178, 226, 261, 288, 465, 1287, 1586, 1696,] and that she smoked a cigarette on a very few occasions. [*fo.* 175, 248, 507, 578, 680, 1265, 1266, 1287, 1351, 1474, 1501, 1528, 1586, 1695.] After a month had been spent in these attempts, and in equally irrelevant assaults upon all Mrs. Forrests friends, the Court at last set a limit to irrelevancy. An offer to prove noises in the street, at night, opposite her door in Sixteenth street, was rejected. An offer to prove a freedom of manners in receiving as visitors gentlemen not charged as *participes*, was also rejected. [*fo.* 1174 to 1177.] These rulings are excepted to. [See OPINION *fo.* 3619 to 3626.]

Mr. Forrest has throughout assailed and abused every one who has afforded Mrs. Forrest the least aid, or who he supposed might do so.

1. He rudely addressed and threatened N. P. Willis in the public street. [*fo.* 1530, 1531, 1535.]
 2. He assailed Samuel Marsden Raymond in the street at night. [*fo.* 1312 to 1322.]
 3. He endeavored to intimidate old Capt. Calcraft and drive him out of the country. [*fo.* 1349, 1350, 1358 to 1360.]
 4. He sought to stimulate the servility and the *pride* of Jamison whilst drunk, so that he might boast of *favors* from Mrs. F. to the end that a hireling might retail, as *hearsay* evidence for the Pennsylvania Legislature, the drunkard's utterances. His favor to the liar and the retailer, and his fortune were held out as inducements. See the Forney letter. [*fo.* 1434 to 1437.]
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Yet on the trial Mrs. Forrest had satisfactory disproof of all his improven slanders.

The recriminatory charge, in this case, implicated six persons. Four of these appeared at the trial and completely refuted the charge; N. P. Willis, [fo. 1509, 1510, 1517, 1535,] Richard Willis, [fo. 1494,] S. M. Raymond, [fo. 1257, 1308,] Granby Calcraft. [fo. 1345, 1346, 1349, 1361.]

Capt. Howard was out of the country, and having failed to answer fully a cross-interrogatory referring to his intercourse with another person, his testimony, taken by commission, was excepted to by the defendant, and rejected. *Herald Report of Forrest Divorce Case*, p. 104.

Jamison, the author of *Consuelo*, alone failed to appear. He was a fellow-actor and intimate of Mr. Forrest. Mr. Forrest designed from the first to lure him into becoming an instrument. Doubtless he was induced to keep out of the way.

But Mr. Forrest himself put in evidence Jamison's solemn averment of Mrs. Forrest's entire innocence. [fo. 518, 521, 527 to 532.]

It has been stated that in order to identify the *Consuelo* letter, and get it before the jury, Mr. Forrest produced one of his own affidavits and two affidavits made by Mrs. Forrest. [fo. 742, 743, 868, 1011 to 1020, 1090 to 1094, 1187, 1188, 1672 to 1676.]

These affidavits are set out in the case. They contain quite a full history of the controversy. See them:

Mrs. Forrest's aff't. of Sept. 2, 1850. [fo. 1021 to 1039.]

Mr. Forrest's aff't. of Nov. 15, 1850. [fo. 744 to 868.]

Mrs. Forrest's aff't. of Dec. 20, 1850. [fo. 869 to 1010.]

Two affidavits which were read on the motion for a commission to California, complete the narrative:

Margaret E. Voorhees' aff't. [fo. 2444 to 2480.]

Catharine N. Sinclair, formerly Forrest. Her aff't. [fo. 1896 to 1929.]

See also letters of Senators Walker and Brooke. [fo. 2537 to 2549.]

Fifth Head: *Motion for alimony.*

Between the jury-trial and the reversal at General Term, more than four years elapsed. [*fo.* 80, 1820.] When the latter event occurred, Mrs. Forrest had left California for Australia. [*fo.* 1899.] On her return to the U. S. in mid-winter of 1858, her counsel's engagements did not permit him to proceed immediately in the alimony reference. Proceedings were commenced May 25, 1859. [*fo.* 1904, 1934 to 1938, 1841.]

Mr. Forrest's efforts to delay this proceeding are stated under the *first head*. His aim was to renew the same course of intolerable slander, in which he had been so signally foiled ten years previously.

See the OPINION of the Special Term on the motion. [*fo.* 3916.] And OPINION of General Term on same. [*fo.* 3759 to 3818.]

On the reference, Mr. Forrest offered his own testimony and was the principal witness. See his evidence. [*fo.* 2953 to 2983, 3001 to 3050, 3057, 3092 to 3110, 3112 to 3134.]

At one theatre he received, subsequently to the divorce, say \$78,000. [*fo.* 3221.]

What became of this money could not be extracted from him by cross-examination. He received money from other like sources; but nothing could be wrung from him as to the amount or disposition of it.

He made strange statements about gifts to his sisters and loans from them.

The referee found that these gifts and loans were fictitious. Such was plainly the case.

It has been already shown that his estate exceeded \$260,000. [*fo.* 2957.]

The defendant offered a hotel-servant to support an alleged act of incontinency by plaintiff, subsequently to the divorce. The referee rejected this evidence. [*fo.* 3051, 3053.]

The defendant offered to prove, that whilst in California, she was extravagant in her expenditures, that she was reputed to be unchaste, and was visited by "the profligate men of San Francisco." The referee rejected this offer. [*fo.* 3072 to 3074.]

No other question of evidence arose before the referee.

At the special term hearing on this matter, the defendant contended that the order of reference as to the alimony could be made at a *special* term only. [*fo.* 3464.] It is supposed that no other tangible question was presented at the special term. [*fo.* 3461 to 3479.]

No application was ever made to the Court for a reference concerning Mrs. Forrest's morals or mode of life; nor was any evidence offered at the hearing before the special term on those points.

POINTS.

FIRST POINT. The judgment for a divorce affirmed at the General Term January 24th, 1856, was a final and perfect judgment; and not having been appealed from within two years, a review in this Court is barred by the statute of limitations.

Code, § 331, Laws of 1851, p. 109, supplement.

- I. Prior to the Code an appeal lay from any and every interlocutory order in equity affecting the merits as well as from the final decree. The practice was otherwise in common-law actions.

{ *Jaques v. Meth. Ep. Church*, 17 *Johns.*, 556
to 560.

Kane v. Whittick, 8 *Wend.*, 225-233.

- II. The Code introduced a rule that the review *in this Court* of interlocutory orders leading to a final judgment should stand upon the same footing in equity as it had before stood at law. The appeal was given from the “judgment;” and on that appeal this Court was authorized “to review any *intermediate* order involving the merits and necessarily affecting the judgment.”

Code, § 11.

Harris v. Clark, 4 *How. Pr. R.*, 78.

Cruger v. Douglas, 2 *Const.*, 572.

Chittenden v. Miss. Soc., 8 *How. Pr. R.*, 328.

- III. The “further decree or order” for alimony is not any part of the judgment for a divorce. It

is not a necessary consequence of such judgment, but rests altogether in the discretion of the Court. As in the case of a proceeding to recover mesne profits after recovery in ejectment by separate action or by suggestion on the foot of the judgment, the plaintiff may thus proceed or not at her election. This is conformable to the language of the statute of divorces and to the reason of the thing.

See case, fo. 1844, 1845.

3 R. S., p. 236, § 58, *fifth edition*.

McKarracher v. McKarracher, 3 Yeates, 56.

{ *Shotwell v. Shotwell*, *Smedes & Marsh. Chy.*
R., 65.

- IV. The "intermediate" order which the Code allows to be reviewed on appeal from the judgment, as its designation imports, is an order which is still *sub judice*, and might be altered or modified at the time of pronouncing the judgment appealed from.

Code § 11.

{ *Per* RADCLIFF, J., *LeGuen v. Gouverneur*, 1
Johns. Cases, 498.

{ *Per* SUTHERLAND, J., *Kane v. Whittick*, 8
Wend., 232.

- V. This is the very point of the decisions in *Kane v. Whittick*, 8 Wend. 231, and *Hollister Bk. v. Vail*, 15 N. Y. R., 594, 595. And it is also the very point of another decision apparently conflicting, but quite in harmony with these two. *Cook v. Floating Dock Co.*, 18 N. Y. R., 232, 239.

SECOND POINT. There was no ground for a new trial of the issues.

I. The guilt of the defendant, if it could be deemed in issue by the pleadings, was clearly established at the trial; and it was not seriously questioned.

1. Laboriously assailing *Doty*, as to the *time* and *place* of commerce with one who was virtually admitted to be his paramour, [*fo.* 106, 112, 91,] was a frivolous waste of time. [*fo.* 1560 to 1577, 1698, 1782 to 1787, 1720, 1788 to 1790.]
2. Equally idle was the production of testimony by medical experts, concerning the physical peculiarities of the same person. [*fo.* 1691, 1692.]

II. In the nature of things, a negative is generally not susceptible of absolute proof. With this single qualification, it may justly be said that the innocence of the plaintiff was as manifestly proven as the guilt of the defendant.

1. The "tattle" of Underwood (*ante*, p. 22) was perfectly frivolous. Deming's tale, (*ante*, p. 33) if candid, would not satisfy any rational mind. And the story of John Kent, [*ante*, p. 30] if not perverse, was conclusively explained, and rendered innocuous.
2. Robert Garvin [*ante*, p. 23] and Ann Flowers [*ante*, p. 26] alone deserve the name of impeaching witnesses. The testimony of each was effectually impeached,

and, indeed, shown, *by itself*, to be perjured. The Mercer street conspiracy by Forrest, Dougherty and Flowers to scandalize Mrs. Forrest, was the crowning infamy of the defendant's case. *Ante*, p. 27.

Vivles v. Young, 13 *Vesey*, 146.

3. The corrupt imagination which gave a grossly sensual import to the poetic effusion of Jamison in the "Consuelo" letter, was nurtured in a brothel. [*fo.* 1202.] It can find no peer upon the judgment-seat. Indeed, that letter was no evidence against Mrs. Forrest.

Com'th. v. Eastman, 1 *Cushing*, 215.

III. Upon principles well settled before the Code, and not altered thereby, a new trial will not be awarded in actions of divorce, unless for substantial errors shewing that a fair trial was not had, and affording reasonable doubt as to the justice of the result.

{ *Mulock v. Mulock*, 1 *Edw. V. C. R.*, 18, and
cases there cited.
Lyles v. Lyles, 2 *Hill's So. Ca. Eq. R.*, 82.
Barker v. Ray, 2 *Russ.*, 76, 77.

1. The law of divorce would be useless to the innocent party and destructive to the public, if new trials were granted upon the slight exceptions which sometimes avail in ordinary suits concerning property or for damages.

2. This doctrine is specially applicable, when a confessed adulterer, who has stuffed the records of the Court with irrelevant testimony, asks for a new trial of his recriminatory charges merely on the ground that some irrelevant testimony was admitted, or that some of very slight relevancy was rejected.

3. When the defendant's guilt is established and beyond doubt, he has, at any stage of the case, only the merest technical right to be heard as an accuser in recrimination. In such a state of things, the Court may, in its discretion, disregard his desire to assume its office, as *custos morum*.

{ *Bacon v. Bacon*, 2 *Swabey & Tristram*,
p. 54.

{ *Winstone v. Winstone*, 30 *L. Journ.*,
N. S. Prob. & Mat., p. 109.

4. In Scotland, recrimination is not a defence. Probably it was not a defence in this State until 1830.

Hosack's Conf. Laws, p. 258.

{ *Jardine v. De La Motte*, *Moore's notes*
to *Stair*, p. 27.

{ *Reviser's Notes*, 3 *R. S.*, (second ed.), p.
662, note to § 47.

5. In the parent State it has been thought wise in modern times to grant alimony in proper cases even to a wife divorced for infidelity.

3 *Blackst. Com.*, 94.

20 and 21 *Vict.*, *Ch.* 85, §§ 27 to 32.

Browning's Prac., 150.

Latham v. Latham, 26 *London Jur. Rep.*, *N. S.*, 218. *S. C.*, 30th *Law Journ.*, *N. S. Prob. and Mat.*, 43.

Holt v. Fleming, 28 *L. Journ.*, *N. S. Prob. and Mat.*, 12.

Winstone v. Winstone, 30 *L. Journ.*, *N. S., Prob. and Mat.*, p. 109.

IV. There was no valid exception to any ruling at the trial.

1. Ann Flowers introduced on her direct examination, in order to gain credit, a pretence that she was a chaste and inexperienced child, and that, as such she was naturally shocked and terrified into tears on witnessing illicit commerce. She also, for a like purpose, at the defendant's instance, and in despite of the plaintiff's effort to exclude it, introduced a deeply injurious imputation upon the plaintiff, to wit : that she had been ravished by Howard in pursuance of an atrocious conspiracy to that end between him and Mrs. Forrest. It was quite relevant to show, in reply, that she was previously unchaste.

Ante, p. 29, 30.

{ *Case*, fo. 3645 to 3655, and authorities
there cited.

Also case (fo. 3511 to 3518.)

People v. Abbott, 19 *Wend.*, 201.

Camp v. State, 3 *Kelly's Ga. R.*, 421.

{ *Dozier v. Joyce*, 8 *Porter*, 314, and cases cited.

Fleming v. State, 5 *Humphrey*, 564.

2. Lawson was produced to prove that Mrs. Forrest made concessions for a reconciliation. He was Mr. Forrest's agent; and there was fair ground to presume that he acted in Mr. Forrest's behalf and with his consent, in the negotiation. He testified, on his direct examination, in general terms, to Mrs. Forrest's alleged communications to him therein. This rendered competent the letters between them on this very point, during the treaty. *Ante pp.* 35, 36.

Casc, fo.

3. The defendant having given in evidence a portion of Mrs. Forrest's affidavit, she was entitled to have read to the jury all the rest of it which was relevant.

Ante p. 37,

{ *Case, fo. 3545 to 3614, and authorities*
 { *there cited.*

Prince v. Swett, 2 Mass. 569.

Pendleton v. Weed, 17 N. Y. R. 79.

{ *Cobbett v. Grey, 4 Exchequer, 729.*
 { *[Welsby, Hurlstone & Gordon.]*

Gordon v. Preston, 1 Watts' Penn. R.,
 385, 388.

4. If any part of the matter called out by the exercise of this privilege, was irrelevant, the defendant was bound to point it out, and specially except to such part. A general exception would not suffice.

Moore v. Bk. of Metropolis, 13 Peters,
 310.

Requa v. Holmes, 16 N. Y. R., 201.

5. The defendant had no right to read his own affidavit, as evidence, to the jury. And he was offered the privilege of reading as much of it as was necessary for the purpose of rendering intelligible the affidavit of Mrs. Forrest.

Case, fo. 3558.

McBride v. Cicotte, 4 Gibbs Mich. R.,
 479, 495.

Krider v. Lafferty, 1 Wharton, 303, 313.

6. The offer to go into a fresh mass of irrelevant abuse, similar to the kitchen testimony, was properly rejected. [*fo. 1174 to 1176.*]

Ante, pp. 37, 38.

OPINION, *fo. 3619 to 3626,*

Ib. fo. 3519 to 3526,

7. The other exceptions are extremely trivial.

Daniel v. Daniel, 39 Penn. R., 212.

THIRD POINT. There was no error in the proceedings taken to fix the alimony.

- I. On reversing the Special Term order as to alimony, in 1856, the General Term proceeded properly, as the appellate branch of the Court, in making the order which, in that stage of the case, the tribunal *a quo* ought to have made in the first instance. And, if this was not so, the asserted irregularity being merely formal and of a trivial kind, it was waived by the defendant's express assent to proceed under this order of the General Term, when the plaintiff sought a Special Term order of reference.

Case, fo. 3462, 2749. Ante, p. 4.

- II. If the defendant had a right, after the divorce, to renew his attempts to impeach Mrs. Forrest's prior life, or, in like manner, to assail her in reference to subsequent acts, he did not adopt the proper course for that purpose.

1. The order of reference was in the precise language of the Statute; and it did not authorize the referee to examine any thing beyond "the circumstances of the parties respectively." Evidence touching their *mors* was not within the range of inquiry prescribed to him.
2. Mr. Forrest neither applied to the Court for a special reference, or a special direction to inquire into the morals of the par-

ties ; nor did he offer any evidence on these points to the Special Term, when the motion for alimony was brought to a final hearing.

III. After the husband is convicted of adultery and a divorce is thereupon adjudged, the considerations governing the amount of alimony are essentially of a pecuniary nature. The proper measure of the (late) wife's expenditure, the the amount and income of the (late) husband's estate, and the other duties or burdens chargeable upon him, constitute the only legitimate subjects of inquiry.

1. On a limited divorce, the alimony is to be regulated by "the nature and circumstances of the case," and it is to be awarded "as the nature of the case renders suitable and proper." 2 R. S., 147, §§ 54, 55. But, on a divorce for adultery, the *strictum jus* is applied. A complete forfeiture of the offender's marital rights ensues. [1 R. S., 741, § 8. 2 R. S., 145, §§ 45 to 49. *Wait v. Wait*, 4 Const. 95.] And the alimony is to be what the Court shall deem just, "having regard to the circumstances of the parties respectively." *Expressio unius exclusio est alterius*.

2. The course of decision is in harmony with the language of the legislature. The only relevant inquiry, at this stage, is as to the defendant's "*faculties*" and the plaintiff's need. Every thing to be found in the elementary works goes upon this assumption,

{ 2 *Bright on Mar. & Divorce*, Lock-
wood's Ed., p. 358, §§ 9, 17.

2 *Barb. Ch. Prac.*, p. 266, note g.

Shelford on Mar. & Divorce, 588, 596

{ *Poynter on M. & Div.*, 248, 249, and
cases cited in notes.
Ib. p. 255, and notes.

3. The amount of the alimony being in the discretion of the Court, it may be admitted that facts bearing on the morals of the parties already developed on the trial of the issue or otherwise incidentally proven, may properly be considered. Such a course is universally practised in the exercise of judicial discretion. But this practice is never allowed to subvert the important rule that no evidence is to be received except that which bears upon the points *in issue*.

4. After the divorce, there was no issue before the Court touching the chastity or private morals of either party. The defendant stood in its presence a convicted adulterer; the plaintiff stood acquitted.

Bacon v. Bacon, 2 *Swabey & Tristram*, p. 54
Winstone v. Winstone, 30 *Law Journ.*, N.
S. *Prob. and Mat.*, p. 109.

- IV. If the Court had power to re-open the issue touching private morals, a just discretion forbade that course in the present case.

1. The peremptory right to a commission given by statute applies only when there is an issue to be tried, or damages are to be assessed on an interlocutory judgment. In the latter case the *plaintiff alone* may demand it.

2 *R. N.*, 393, §§ 11, 23, 24.

2. If the allowance of a commission depended on the equitable discretion of the Court, the refusal was proper.

See plaintiff's points, 3 *Bosw. R.*, 681.

- a. The sweeping extravagance of the charges in the petition (*fo.* 1837 to 1865) was in perfect harmony with the uniform course of the defendant's prior conduct. His multitude of witnesses (*fo.* 74) and his attempt to transfer the investigation to a distance, harmonized with his uniform policy. *Ante*, p. 19. His insinuation that the witnesses whom he might have occasion to examine, would not be candid or truthful, was the only part of his petition which the experience of the Court would have justified it in crediting. [*fo.* 1849.]
- b. The excuses for not seeking a commission at an earlier period, were not sustained. His motives were shewn to be perverse.
- c. The plaintiff left California in April 1856. The order of reference was made subsequently in the same year, and three years had thereafter elapsed before this motion was made. An effort to secure many months more delay without a Commission, was first made; that failing, the Commission was resorted to. [*fo.* 1939.]
- d. If a rambling commission to hunt up testimony among the floating population of California had failed to elicit such testimony as might serve his purposes, the defendant might next, with equal justice, have demanded years subsequently, other commissions to Australia, to England, and to the various and distant abodes of all the sailors and passengers who voyaged with Mrs.

Forrest, to gather their evidence of her walk and conversation during the three years subsequent to her departure from California. If she had been naughty with so many in his dwelling-house before the separation whilst *her honor was unsullied*, and afterwards, with still greater numbers in California, surely she must have committed a vast amount of crime during those last three years. Though she left California in April, 1856, no other Commissions were sought in 1859, because one to California would *then* have answered all needful purposes. It would afford the opportunity of presenting a scandalous petition, filling the newspapers with invective and reproach, and delaying the case, thereby keeping the plaintiff in toil and penury for the next two or three years.

- e. The difficulty and cost of cross-examining witnesses like *Garvin*, *Underwood* and *Flowers* in California, would have compelled the plaintiff to waive that vital privilege.
- f. The designs of the defendant were unmistakeably developed in the testimony of Messrs. Sedley and Brown. [*So*. 1941 to 1947.]

The instant the plaintiff returned to New-York, the defendant was at her heels to ostracize her by imputations of pauperism and guilt, evidently intending that no respectable person

should dare to give her courteous treatment, and that no respectable house should shelter her.

V. If the Court, as *custos morum*, could rightfully have instituted a special inquiry into the moral conduct of the plaintiff, subsequently to the divorce, the defendant was not entitled to the office of promovent in the proceeding; nor could he appeal from the refusal to hear him.

1. A repudiated adulterer, expelled for his crimes from the honorable rank of husband, by judicial sentence, has no right to play spy upon the life and manners of a woman whom the law has relieved from his lewd and immoral society.
2. Perhaps, in its discretion, a Court might hear a person acting *ut amicus curiae*, on an inquiry into the morals of a suitor for its justice. But:
3. If a wealthy husband, divorced for his adulteries, who had sent forth penniless upon the world a pure and virtuous wife should, at last, after hunting her for years with false and scandalous imputations, succeed in destroying her sense of shame; so that, yielding to despair, overwhelmed by want and imputed infamy, she should fall, no court of justice would listen to him as her accuser.

FOURTH POINT. The amount to be allowed as alimony is in the discretion of the Court. It is determinable by the judge, without jury, summarily;

and "there is no other rule or criterion to guide than the *boni viri arbitrium*." The law does not contemplate a review of such decisions in this Court.

Judges of Oneida v. The People, 18 *Wend.*, 87, 99.

Same book, p. 288.

Buffalo Savings Bk. v. Newton, 23 *N. Y. R.*, 160.

Rogers v. Holly, 18 *Wend.*, 351.

16 *Wend.*, 375-378.

{ *Per Nelson, Ch. J., Burr v. Burr*, 7 *Hill*, 210,
212. *No question of law is involved.*

Thurber v. Townsend, 22 *N. Y. R.*, 519.

Swearingen v. Swearingen, 19 *Geo. R.*, 267.

FIFTH POINT. The Appeal or Appeals should be dismissed, or the judgment affirmed.

HOWLAND & CHASE,

Att'ys. for Plaintiff.

CH. O'CONOR,

of Counsel.

*Argument on the motion stated at fo. 3820, taken
from the N. Y. Herald, Dec. 21, 1859.*

MR. O'CONNOR, on the part of the plaintiff, said that the defense in this case is manifestly perverse—its whole progress is marked with consciousness that it is without merit and without excuse. Its aim is, by technical exceptions, to retard the footsteps of justice during the whole life of the plaintiff. The defendant's guilt is not only found of record by the verdict of a jury and the judgment of the Court, but it is substantially confessed. The witness who proved it was not cross-examined, nor was the truth of her statement questioned on the trial, nor has it been since denied. Whilst living in matrimony with his wife, and, as he swears, in full confidence of her purity and affection, he was for years the habitual occupant in the day time, of rooms in a notorious house of prostitution. None but persons of the loosest morals and of the grossest tastes will deny that such conduct amounts to guilt of the most loathsome character. The entire innocence of the plaintiff is not only found of record in the like solemn manner, but it is, to all fair and just minds, made manifest by acts on the part of the defendant, showing that he is conscious of her innocence. He perseveringly sought to try and convict her by the judgment of a political body in Pennsylvania, where neither party had ever resided, where no witness for or against her resided, and where no misconduct was ever alleged to have been committed by her. When tried in the place of the matrimonial domicile, he produced four servants as witnesses to impeach her. Their total want of veracity, and the improper means which had been employed to procure their testimony were so apparent, that the jury discredited them. And so conscious were the defendant and his counsel that the jury rightly discredited these witnesses, that they made no motion for a new trial on that ground. From the moment her in-

nocence was thus made manifest, in 1852, he refused to allow her any means of support until compelled to do so in July, 1859. By offensively assailing persons who offered her any courtesy, pronouncing her unable to pay her board, and of unchaste manners, he sought, during this interval, to expel her from virtuous society and to deprive her even of shelter. Without laying before the court the least proof of any improper act on her part, he sought to overwhelm the plaintiff with vexation and expense by a rambling commission to California, expecting to pick up in a distant clime some worthless person to "bear witness" in like manner as his four employ  s did on the trial. With evident intent to defeat the justice of the court, he has, during the progress of the case, withdrawn as much of his property as possible from its jurisdiction, and has further essayed to defeat justice entirely by pretended gifts, and by dispositions of the character condemned as being made "with intent to hinder, delay and defraud creditors." Being a man of vast wealth, living in the best style in a stately, well furnished mansion in the city of Philadelphia, it is his moral and social duty to maintain and support the woman who spent her brightest years as his wife and in his service, and that, too, in such a manner as may afford her every inducement to a pure and respectable course of life. By refusing to contribute anything to her support, and persecuting her with the reproach of poverty and with imputations of dishonor, he has proved himself to be lost to all sense of justice. The contest touching the alimony is most discreditable. If he thought her guilty and desired another opportunity to prove it, he could have had the judgment of the court of last resort on his prayer for a new trial years ago. The alimony then fixed was moderate and reasonable; he had but to acquiesce in it, and he need not to have paid a cent until his right to a new trial was determined. If he was not entitled to a new trial on the merits, and the plaintiff was entitled by

the judgment of the court of last resort to stand acquitted, he should have blushed to allow her less than \$3000 a year, considering the extent of his property. But even on the assumption that the judgment for a divorce may stand forever unreversed, he would still keep up the litigation, and has kept it up for seven years, merely to avoid a payment which, if that judgment is to stand, he ought to make without compulsion. He now announces his intent to pursue this same course of litigation, on the mere pecuniary question, for many years to come. No favor or facility ought to be granted a suitor pursuing such a course; and an order should be made, at this stage of the case, requiring an interim allowance at the rate fixed by the referee, with a proper allowance for expenses. This is no more than just, even if all his exceptions should be ultimately allowed. The course of vexation and delay pursued is manifestly and avowedly with a design, on his part, to defeat the plaintiff's just claim; and if his counsel's views of the law as to arrears are sound, any little technical exception which might lead to a rehearing would accomplish that design.

MR. JAMES T. BRADY, on behalf of the defendant, contended that the delay in the final judgment in this case was not occasioned by nor the desire of the defendant; but, on the contrary, as he and his counsel were confident of ultimate success, it was his anxiety that the matter should reach the court of last resort as speedily as possible. Counsel recounted the several occasions of the delays, and stated that in one instance only was a delay made at the request of the defendant, and that was when Mr. Van Buren was in Europe. MR. BRADY continued for some time to urge upon the Court the justness of their demand for time to make a case on the Referee's report.

MR. O'CONOR replied, elaborating somewhat on the views he had previously presented.

The Court Reserved its decision.

OPINION OF THE COURT OF APPEALS,

CATHARINE N. FORREST

agst.

EDWIN FORREST.

WRIGHT, J.

This controversy, as like cases are apt to be, has been bitter and protracted. Twelve years since, the wife brought her action against the husband for a divorce on the ground of adultery, and for over eleven years she has had the verdict of a jury, convicting him of the offence, and the judgment of the Court dissolving the marriage. During this latter period, the controversy has been principally in respect to alimony, a mere incident of the judgment. For more than ten years the plaintiff has been divorced from the defendant, and at liberty to marry again; yet, we are now called upon to review the judgment of divorce, and if a merely technical error shall be discovered in the protracted trial of the issues of adultery of the defendant, or plaintiff, to reverse such judgment. Six years had elapsed from the affirmance of the judgment by the General Term of the Superior Court before this appeal was brought; and as the judgment for a divorce was a final and perfect one, and the "further decree or order" for alimony, not any part of it, or a necessary consequence of such judgment, but resting in the discretion of the Court, and the judgment not having been appealed from within two years, we should probably have dismissed the appeal a term or two since, when a motion to dismiss it was made, had the law regulating appeals to this Court been the same as originally enacted in the code. In 1857, however, the provision in respect to appeals was so

amended as to authorize an appeal to be taken " within two years after the judgment shall be perfected, by filing the roll thereof, and entering the same in the judgment book, in the proper clerk's office," (*Laws of 1857, vol. 2, chap. 723, § 18,*) and in 1858, it was still further amended so as to allow an appeal to be taken " within two years after the judgment shall be perfected by filing the judgment roll," (*Laws of 1858, chap. 306, § 14.*) The judgment roll in this case was not filed as would seem until March, 1862, and the defendant had two years from the latter date within which to appeal and before a review in this Court could be barred. By § 331 of the code of 1851 the appeal must have been taken within two years after the rendition of the judgment ; but by subsequent amendments of the section it was allowed to be taken within two years after "*the judgment shall be perfected by filing the judgment roll.*" We are of the opinion therefore, that a review in this Court of the judgment affirmed at the General Term in July, 1856, is not barred by the statute.

A preliminary point made by the defendant is, that the Superior Court had not jurisdiction of the action. This point was first raised on appeal to the General Term but if well taken is available at any stage of the suit. It proceeds on the ground that the Legislature was incompetent to confer, and, in fact has not conferred jurisdiction in divorce cases on the Superior Court. I think the ground is not maintainable. During our colonial existence, and for more than ten years after the colony became a State, there was no authority in any Court of this State to grant a divorce. In 1787, the Legislature conferred authority upon the Court of Chancery to grant divorces in cases of adultery. This continued to be the only law until the revision of 1813, when the Legislature made a new and extensive provision for divorces, and widening the jurisdiction of the Court of Chancery.

It was competent for the Legislature to have conferred the jurisdiction upon an existing court, or to have created one having powers as to divorce cases similar to the ecclesiastical courts of England. The Constitution of 1821 imposed no restriction on the power of the Legislature in this respect. In the Revised Statutes while continuing the authority in the Court of Chancery over matters of divorce, the Legislature adopted a system in many respects new, and more comprehensive, and to some extent regulating the practice in that class of cases. The tendency of legislation from the beginning was to invest the court of equity with an authority over a subject that in England belonged exclusively to the spiritual courts and to Parliament. Thus the law continued until 1846, when the Constitution abolished the Court of Chancery, and provided for a Supreme Court having general jurisdiction in law and equity. The same power was given to the Legislature "to alter and regulate the jurisdiction and proceedings in law and equity, as they have heretofore possessed" (*Con. Art. 6, § 6*). By the judiciary act of 1847 the Supreme Court was vested with the same powers and authorized to exercise the same jurisdiction as was then possessed and exercised by the Court of Chancery (*Laws of 1847, chap. 280, § 16*). The Constitution of 1846 had provided expressly for the establishment by the Legislature of inferior local courts, of civil and criminal jurisdiction in cities (*Const. Art. 6, § 14*), and that the Superior Court of the city of New York should remain until otherwise directed by the Legislature, with its then powers and jurisdiction, (*Con. Art. 14, § 12*). In 1848, the Legislature abolished the distinction between actions at law and suits in equity, and the forms of all such actions and suits theretofore existing, and enacted that there should be in this State thereafter but one form of action for the enforcement or protection of private rights and the redress or prevention

of private wrongs, which should be denominated a civil action (*Code of 1849*, § 62). Remedies in courts of justice were divided into actions and special proceedings, and an action was defined to be an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement of a right, the redress or prevention of a wrong, or the punishment of a public offense. (*Code of 1849*, § 22). The code prescribed a uniform mode for the commencement of the action, viz.: by summons and complaint, and as indicative of the intention of the Legislature to embrace within the definition of an action under the code, one for a divorce, the amended code of 1851, expressly provided for the service of the summons by publication when the defendant could not, after due diligence, be found within the State, "where the action was for divorce in the cases prescribed by law" (*Code of 1851*, § 135, *sub.* 5). The code provides that the jurisdiction of the Superior Court shall extend to the actions enumerated in sections 123 and 124 (when the causes of action are local or against public officers), and to all other actions where all of the defendants shall reside, or are personally served with the summons within the city of New York, (*Code of 1849*, § 33). This language is comprehensive enough to embrace an action for a divorce against a person, resident and served with the summons in the city of New York. The defendant resided and was served with the summons within that city.

By no proper construction of the Constitution of 1846 can it be deemed to have vested in the Supreme Court, as successor of the Court of Chancery, the whole jurisdiction as to divorce cases, without any authority in the Legislature to confer it on any other tribunal. The Legislature was, without doubt, competent to vest such jurisdiction in the Superior Court, and if the proceeding to obtain a divorce is an action within the meaning of that word, as used in the code (and this ad-

mits of no question), then it has exercised the power in a case where the defendant resides, or is personally served with the summon, within the city of New York. The jurisdiction of the Supreme Court is not taken away or interfered with in this class of actions, but the Legislature has chosen to confer a limited concurrent jurisdiction on the Superior Court.

The complaint charged the defendant with having committed adultery with persons named, and also at specified times and places, with persons whose names were unknown to the plaintiff. The defendant, by his answers, scarcely put his guilt in issue. He denied "that he committed adultery with any or either of the women mentioned and referred to in said complaint, at any or either of the times and places stated in said complaint." This is hardly more than putting in issue the fact of the commission of adultery at the times and places stated. The burden of the answer consisted in recriminatory charges of adultery of the plaintiff, in defense and bar of the action. In December, 1850, the issues as to the adultery of the defendant and also of the plaintiff were ordered by the Court to be tried by a jury. Subsequently, and before the trial was had, the code was amended, by directing that an issue of fact in an action for a divorce from the marriage contract on the ground of adultery, should be tried by a jury (*code of 1851, § 252*). In December, 1851, a jury was impaneled before the late Chief Justice OAKLEY, to try the issues of fact, and, after a trial which occupied six weeks, a verdict was rendered against the defendant on all the issues. The jury found that the defendant had committed adultery, as charged in the complaint, and that the recriminatory charges against the plaintiff were not sustained. The large volume furnished to us and to the General Term of the Superior Court contains all the evidence taken, and a full history of the proceedings on the trial of the issues; and the case cannot be read without admiration of the ability

and rigid impartiality of the presiding Judge. If there was anything in the conduct of the trial to be censured, it was the latitude extended to the defendant in his recriminatory effort. The greater part of a trial, unusually and unnecessarily protracted, was consumed, not in an effort to maintain or establish the innocence of the defendant, but in an attempted recrimination of the plaintiff. Of the numerous exceptions taken by the defendant to the decisions of the Judge in admitting or rejecting evidence, but three (only one of which is now insisted on) were to proof bearing on the question of the defendant's guilt, whilst most of the others were to evidence elicited, or sought to be elicited, to establish or overthrow the defense of recrimination.

The result of the trial of the issues, as has been said, was a conviction of the defendant, and an exculpation of the plaintiff, from the charge of adultery. The defendant did not complain that the verdict of the jury was unsupported by the evidence, or ask for a new trial on the merits; but contented himself with appealing from the judgment for a divorce, subsequently rendered at Special Term, and asking a reversal thereof exclusively, on the ground of alleged errors of the Judge, in admitting and rejecting evidence on the trial of the issues of fact, and of the Court in the award of alimony. It was insisted that the same principles upon which a court of law formerly proceeded in granting or refusing a new trial should be applied to the case, and if evidence had been rejected on the trial of the issues that ought to have been received, or evidence received that should have been rejected, the defendant was entitled to a new trial. This is hardly the rule now in a court of law for latterly, even these Courts undertake to judge for themselves of the materiality of evidence found to have been improperly admitted or rejected; and when satisfied that no injustice has been done, and that the verdict

would have been the same with or without such evidence; they have refused a new trial. (*Doc vs. Tyler*, 6 *Bingham* 561). Courts of equity have, however, been governed by very different principles from those of a court of law, in granting or refusing new trials of issues of fact. Though evidence had been improperly admitted or rejected, if a court of equity was satisfied that the verdict ought not to have been different, it would not grant a new trial merely on such ground (*Barker vs. Ray*, 2 *Russ.*, R. 63; *Lyles vs. Lyles*, 1 *Hills, So, Car., Eq. R* 82). The object of a feigned issue is to satisfy the mind of the equity Judge upon matters of fact, and the object is attained when the conscience of the Judge is satisfied that, at the trial, justice has been substantially done. (*Mulock vs. Mulock*, 1 *Edwards, Ch, Rep.*, 14. *Apthorp vs. Comstock*, 2 *Paige R.* 453; *Collins vs. Harc 1 Dow & Clark, Rep.* 139; *S. C. 2 Bligh's Rep. [N.-S.]* 106; *Bootle vs. Blundell*, 19 *Vesey*, 503; *Savage vs. Carroll*, 2 *Ball & B. Rep.* 444). The application for a new trial is in the discretion of the equity Judge, and upon principles well settled before the code, and I think not altered thereby. A new trial would not be awarded in actions of divorce, unless for substantial errors, showing that a fair trial was not had, and affording reasonable doubt as to the justice of the result. The law of divorce would be useless to the innocent party, and destructive to the public, if new trials were granted upon slight or sharp exceptions, that astute counsel may take in the progress of a protracted investigation of matters of fact, and which might sometimes avail in ordinary suits concerning property or for damages. The inquiry in a court of equity is, is there enough upon the whole case to show that the verdict of the jury is substantially right. This doctrine is especially applicable, when the defendant's guilt satisfactorily appears, and a new trial is asked of recriminatory charges merely on the ground that some irrele-

vant testimony was admitted or some of slight relevancy was rejected.

It was in the light of these well settled principles that the Special or General Term of the Superior Court were to examine the alleged errors on the trial of the issues of fact. If the errors were so substantial as to lead to the conclusion that the trial had been an unfair one, or that injustice had been done, the Court below should have awarded a new trial ; for the discretion with which it was clothed was not an arbitrary one, and if the errors committed plainly led to injurious and unjust effects, of which the defendant had a right to complain, and there was reasonable doubt of the justice of the result, a re-trial of the issues should have been ordered. Of the twenty-five exceptions to the rulings of the Judge in admitting or rejecting evidence argued in the Superior Court (twenty of which are now insisted on), none were in the view of that Court tenable, or called for a new trial, even tested by the principles on which a Court of law proceeds in granting new trials. They were, to say the least, technical, and if the Judge erred in any of the rulings complained of, such error, in my judgment (and so the Court below had the right to conclude) was not of a character to unjustly affect the general result. Look for a moment at the errors now insisted on. [The learned Judge here examined, *seriatim*, the several decisions of the Court insisted on in the points of the defendant's counsel, as erroneous. This elaborate examination is omitted, as all the Judges concurred in the opinion that the trial was to be reviewed, not as upon a strict bill of exceptions, but upon the principles on which a court of equity examined the trial of a feigned issue awarded for the information of its own conscience. His conclusions were that, tested by the strict rules which a court of law would apply in considering the objections, there were but two or three that were tenable, and these were unimportant as affecting the general

result.] These are all the rulings of the Judge on the trial of the issues of fact urged as errors by the defendant's counsel in his argument at bar.

Tested by the principles which govern a court of law in granting new trials, and treating the case made as a pure bill of exceptions, taken on a trial in an action at law, I am of the opinion, with the Superior Court, that there were no material errors in the admission or rejection of evidence that should lead to a reversal of the judgment. But this was not the way that mere errors alleged to have been committed on the trial of a feigned issue out of chancery were formerly treated and considered, and the code has introduced no new rule on the subject. If the Court below had found on the record exceptions apparently well taken, it was not necessarily required to grant a new trial. The application for a new trial was to the discretion of the Court, and the errors should have been of such a character as to have produced injustice in the general result, to have called for a re-trial. If the Court was satisfied, upon the whole case, that justice had been done, though there were errors, technical and unimportant to the general result, appearing on the record, it was no abuse of the discretion with which it was clothed to refuse the application of the defendant to re-open the controversy. It seems to me very clear that none of the rulings of the Judge complained of had the unjust effect of preventing a fair trial, or of producing injury to the defendant. The General Term of the Superior Court affirmed so much of the judgment as dissolved the marriage contract, and awarded costs against the defendant. In the view we take of the case this was right.

There is an incidental branch of this controversy that has elicited much feeling, and occupied a large share of the attention of the Courts. The statute provides, that if a wife is the complainant, and a decree dissolving the marriage on the ground of adultery be pronounced, the

Court may make a further decree or order against the defendant, compelling him "to provide such suitable allowance to the complainant for her support as the Court shall deem just, having regard to the circumstances of the parties, respectively" (2 R. S. 145 § 45). On the trial of the issues of fact the question was put to the jury, what annual amount of alimony ought to be allowed to the plaintiff, and the jury answered, three thousand dollars. It was for the Court to fix the amount of the alimony, and the jury had no control over the question. This was discovered when judgment came to be pronounced on the return of the verdict of the jury; and after giving judgment dissolving the marriage, the Court proceeded, "upon consideration of the facts admitted by the defendant in the pleadings" to determine that an allowance of three thousand dollars a year for the support of the plaintiff was just, having regard to the circumstances of the parties, respectively, and made a "further decree or order" that the defendant pay to the plaintiff the sum of three thousand dollars a year from the commencement of the action. The only facts admitted by the defendant in the pleadings bearing on the question of alimony were, that the value of his real and personal property did not exceed \$150,000, and that his clear income from such property was not above four thousand dollars; upon these facts alone, it is obvious that the Court was not prepared to make a just disposition of the question of what would be a suitable allowance to the plaintiff for her support, having regard to the statutory requirement. The usual course of the late Court of Chancery in such cases was to order a reference to ascertain, by the report of a master, the value of the defendant's property, the circumstances of the parties, respectively, and what would be a suitable allowance. Such reference should have been ordered at the Special Term, and the General Term, on appeal, so properly considered it, and modified the judgment of the Special

Term by affirming that part of it dissolving the marriage and awarding costs against the defendant, and reversing so much of it as related to alimony, and ordering a reference to take proof, and ascertain and report to the Court what would be a suitable allowance.

It is made a point by the defendant's counsel that the General Term had no power to order the reference. I think it had: the judgment or order, as provided for by statute, directing the payment of permanent alimony, consequential upon the granting of the divorce, was before it on appeal, and it was entirely competent for the appellate branch of the Court, in reversing the order as to alimony, and thus modifying the whole judgment in the action, to make such direction or order as should have been made by the Special Term, in the first instance. I entertain no doubt of the power of the appellate branch of the Court to make the order of reference. If it were an irregularity it was merely formal, and was waived by the defendant's express assent to proceed under the order of the General Term when the plaintiff sought a Special Term order of reference.

The reference was ordered in July, 1856, at which time the plaintiff was on her way from California to Australia, and she did not return to this State until December, 1858. Proceedings on the reference were commenced in May, 1859, and were continued until December of that year. In December, 1859, the Referee filed his report and finding of facts together with the testimony taken before him, and in May, 1860, the Special Term made an order, that the defendant pay to the plaintiff four thousand dollars a year for her support from the commencement of the action, deducting therefrom the sum of two thousand one hundred and fifty dollars paid for alimony *pendente lite*. On appeal to the General Term the order was affirmed.

With respect to this order, the only questions before the Court were—1st. What amount would be suitable

allowance, having regard to the circumstances of the parties, respectively ; and, 2d. From what date should the allowance commence. Both the amount to be allowed, and when the allowance was to commence, were matters in the discretion of the Court. The statute empowers the Court to compel the defendant to provide such suitable allowance, as it shall deem just. Of course, the discretion to be exercised is a judicial, and not an arbitrary one. No reference would have been necessary in the case, if at the time the judgment of divorce was pronounced the Court had been possessed of facts to enable it to reach a just conclusion as to permanent alimony. The object of the reference, and the report of the Referee, is to inform the conscience of the Court, but it is the Court and not the Referee that adjudges the question as to what is a suitable allowance. Hence there can be no available exception to be reviewed by an appellate tribunal, either to the report of the Referee or to his admission or rejection of evidence on the hearing before him. There certainly cannot be to his rejecting evidence, offered by the defendant to prove the immoral conduct of the wife subsequent to the judgment of divorce, on a reference to take proof as to "the circumstances of the parties, respectively." The Court itself might possibly in the exercise of its discretion, either by reference or when the motion for alimony was brought to a final hearing, hear evidence as to the moral conduct and habits of the wife subsequent to the divorce ; but if this be not done all that can be said is, that in determining what is a reasonable and just allowance for her support, such subsequent conduct has not been taken into consideration. If in not doing so, the discretion to be exercised by the Court has been abused, it is the subject of appeal ; but there can be no abuse of judicial discretion, or any subject for appeal, in not allowing a husband divorced from his wife, to be the moving party in a proceeding to inquire into her moral conduct subsequently to such divorce.

The power which the statute confers is to make such allowance as the Court shall deem just, having regard to the circumstances of the parties, that is, the amount and income of the husband's estate, and the other duties and burdens chargeable upon him, and the rank and condition in life of the wife. On a divorce for adultery, the considerations governing the amount of alimony are essentially of a pecuniary nature. If the defendant have the ability to pay, the injured party is to recover such an allowance as will correspond with her social position, and at least maintain her in the style and condition that her husband's fortune would have reasonably justified her maintenance but for his infidelity. She is not to be put on a stinted allowance because the husband has been unfaithful to his marriage vows; but this is rather a reason, if his estate be ample, that she should receive a generous and liberal support. The law allots no definite proportion of the husband's estate for alimony, but leaves to the Court to award such sum, as in the discreet exercise of the power, and having regard to the circumstances of the parties, shall be deemed just. As no two cases are alike, what would be just in one, might be unjust in another. Where the husband is possessed of a large estate, and has no children or relatives dependant on his bounty, and the wife occupies a high social position, and is a lady of refined and intellectual tastes, it would be just to award such a sum as would be ample to maintain her in the state to which she has been accustomed, though such sum were one third, or even one half, of his income. On the other hand, where the estate of the husband is limited, and he has duties or burdens chargeable upon him, and the wife's condition and station in life is comparatively humble, it would not accord with a just sense, nor would there be a fitness and propriety in it, to strip the husband of the bulk of his property, and bestow it on the wife. On adjusting the allowance, where there has been a divorce

for adultery, as it is an act of judicial discretion, the Court may take into account imputations against the wife, and even her moral delinquencies, after judgment has passed in her favor, but under the statute, and in harmony with the course of judicial decision, the main and legitimate subjects of inquiry are the proper measure of the wife's expenditures, the amount and income of the husband's estate, and other duties or burdens chargeable upon him. The relevant inquiry at this stage is as to the defendant's "faculties," and the plaintiff's need (2 Bright on Husband and Wife, 358, §§ 9, 17; 2 Barbour's Chan. Prac. 266, n. g.; Shelford on Mar. & Divorce, 588, 596; Poynter on Mar. & Div., 248, 249, 255, and cases cited in Notes; Robotham *vs.* Robotham, 1 Swabey & Tristram, 192).

The Court deemed four thousand dollars a year to be a just allowance for the plaintiff's support. This appears to be a large sum, but perhaps it is not, taking into view the circumstances of the parties. The value of the defendant's estate is admitted by himself to exceed \$260,000; and there is reason to believe that it is much more, as, during six years next after the judgment of divorce, his professional receipts from one theatre alone amounted to about \$14,000 per annum, and the proceeds of his engagements at other theatres must have been large. He was a distinguished and popular dramatic actor, and his ability in his profession has been appreciated, and generously rewarded. It would not be a high estimate upon the value of his estate to place it at \$300,000. The parties have no issue; but the defendant has three maiden sisters whom he supports, and who now preside over his costly mansion in Philadelphia. The plaintiff is a lady of education and refinement; and previous to this unhappy controversy, and indeed since, has been accustomed to move in the higher social and literary circles of New York. Judging from what appears in the case, she is a woman of re-

markable energy and intellectual power. She was married to the defendant in 1837, when but nineteen years old, and he, though rising in his profession, had but a small estate. For some twelve years his domestic establishment was under her immediate charge, and she conducted it with system, economy, and with a due regard to her husband's pecuniary interests, insomuch, that when, as we are now to assume, without cause, he banished her from his home and association, his estate had increased from about \$12,000, to at least \$150,000. The parties had always resided in a city, and do now, where a larger sum is required for support than in the country. In the case of *Burr vs. Burr* (10 Paige 20 S. C. in error, 7 Hill, 207), which was for a separation from bed and board for cruel and inhuman treatment of the wife, the Chancellor awarded \$10,000, a year as alimony, to begin from the filing of the bill, and the Court for the correction of errors affirmed the order. There the complainant was an aged lady, who, though always occupying a respectable station in life, resided in the country. The defendant's estate exceeded half a million of dollars, and it is apparent that the amount of alimony was largely exaggerated, by a consideration of his cruelty and inhumanity. It may be, that because too great consideration was given to these circumstances, the case is an unsafe precedent to follow. It settles, however, the question, that the conduct of the husband may be looked at in adjusting the amount of alimony, and that in the view of the Court of last resort, under the circumstances of that case, there had not been such an indiscreet exercise of power as to be the subject of an appeal. On a division, but five of the members of the court voted for a reversal of the Chancellor's decree, one of whom was for reducing the amount, of the allowance to \$3,000, and another to \$6,000. In the present case, the husband banished the wife from his house, and ceased to cherish and protect

her, in May, 1849, and, as the subsequent investigation showed, without cause, and with imputations against her unfounded in fact. He paid an annual stipend of \$1,500, for her support, but discontinued that in November, 1850, and left her to support herself, or rely on the favor of strangers.

In view of circumstances developed in the case, the defendant's wealth, and the plaintiff's need (though we might consider the allowance somewhat large), we cannot say that the discretion of the Court below, in fixing the sum was so arbitrarily exercised as to amount to an abuse of judicial discretion. If not, there is no question of law raised to be reviewed in this Court.

The Court awarded alimony from the commencement of the action instead of the date of the judgment of divorce. This, as was said by Chief Justice NELSON, in *Burr vs. Burr* (*supra*), is a matter of discretion depending upon the special circumstances of the case. In the case cited, the allowance was made to commence from the filing of the bill, though \$2,000 a year had been allowed for temporary alimony during the progress of the suit. In this case, it would make about \$4,000 difference whether alimony was allowed from the commencement of the action, or from the date of the judgment of divorce, the action having been commenced in November, 1850, and the judgment pronounced in January, 1852. It seems to me that if it were ever justifiable or a fit exercise of judicial discretion to date the allowance from the commencement of the suit, it was in this case. The plaintiff had been cast out upon the world, and left to the favor of friends for the means of support, and to prosecute her suit. Even the stipend that had been allotted to her for support was discontinued before the action was commenced. Before the judgment of divorce no temporary alimony was applied for or allowed, although the expenses of prosecuting the action, beyond the taxable costs, from the protracted nature of the litigation, must have been large.

The defendant appealed from the judgment, when the cause was hung up in the Superior Court for over four years, evidently, because the plaintiff was without means to employ counsel. To obtain means for her support she was driven to the profession of an actress and theatrical manager, and pursued it in California, and Australia, returning to this State in the winter of 1858. In the meanwhile, and in July, 1856, her cause had been decided by the appellate branch of the Superior Court, but the question of alimony was not definitely disposed of. So much of the judgment as awarded alimony was reversed, and a reference ordered to take proof, and ascertain and report to the Court what would be a suitable allowance to the plaintiff, unless the defendant should, within ten days from the entry of the judgment, without prejudice to any other objection, or exception on his part, file a certificate in writing, waiving all further inquiry touching the amount of alimony, or the time from which it should be allowed. An opportunity was here presented for the defendant to waive all further inquiry as to alimony, and submit to the award made at the Special Term, in January, 1852, without prejudice to his prosecuting an appeal from the judgment of divorce. But this the defendant would not do.

On the return of the plaintiff, and as soon as she was able to procure counsel to attend the reference, it was noticed, and then was commenced a series of efforts to postpone and prolong the hearing, and which, by motions and appeals from orders and from the final order for alimony, protracted the controversy in the Superior Court, until March, 1862, and at an expense to the plaintiff for the whole litigation, exclusive of taxable costs, and which is now due and unpaid, of seven thousand dollars. Under these circumstances I think it was no abuse of judicial discretion to date the award of alimony from the commencement of the action, and hence no question of law is involved in the decision.

The allowance for permanent alimony, and from what date it shall commence, as has been said, are questions resting in the discretion of the Court. There "is no other rule or criterion to guide than the *boni viri arbitrium*." As it is a judicial and not an arbitrary discretion to be exercised, I do not say that there may not be an appeal from such an order. The power must, however, be shown to have been arbitrarily exercised, otherwise the law does not contemplate a review of such decisions in this Court.

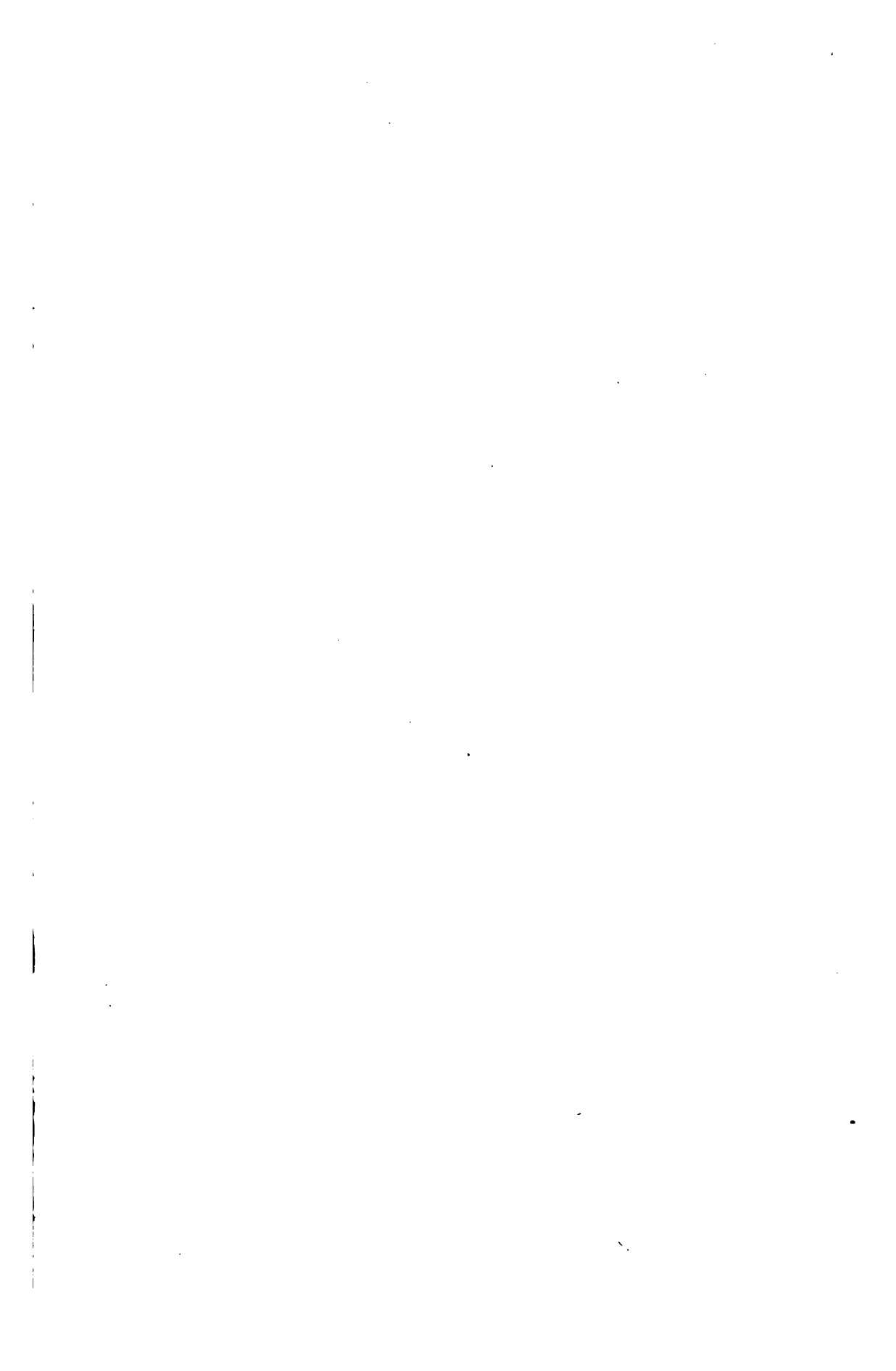
The judgment and order of the Superior Court should be affirmed—all the Judges concurring.

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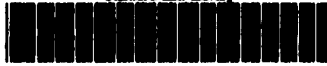
E. PESHINE SMITH,

State Reporter.

See the case in the Court of Appeals, as reported in *25th New York Rep.*, (11 *E. P. Smith*,) p. 501.



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